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No. 06-

IN THE

Supreme Court of the United States

DANNY T. BARNES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, provides that military officers who are nominated by the President and confirmed by the Senate "shall be promoted" to the next higher rank unless they are notified that their promotion has been delayed (and therefore that their name may be removed from the promotion list) before the projected effective date of that promotion, unless such notification is impracticable, in which case notice must be given as soon after the projected date as is practicable. The questions presented are:

I. Whether the Federal Circuit erred in summarily concluding that it was impracticable to timely notify Petitioner of the delay in his promotion simply because he was at sea when it is undisputed that he received at least two official e-mails while deployed and was also reachable by telephone, fax, and electronic message.

II. Whether giving effect to the plain language of DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

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Danny T. Barnes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-13a) is reported at 473 F.3d 1356. The memorandum and order of the Court of Federal Claims on reconsideration (Pet. App. 14a-40a) is reported at 66 Fed. Cl. 497. The original memorandum and order of the Court of Federal Claims (Pet. App. 41a-81a) is reported at 57 Fed. Cl. 204.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 2007. Petitioner filed a timely application for an extension of time to file this petition on March 23, 2007. The Chief Justice granted that application, extending the time to file this petition to May 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

The Constitution also provides:

> The Congress shall have the power [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; [t]o make rules and regulations for the Government and Regulation of the land and naval Forces

> . . . [and] [t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

U.S. Const. art. I, § 8.

The texts of 10 U.S.C. §§ 611, 618, 624, 629, and 741, and the Secretary of the Navy's regulation, SECNAVINST 1420.1A (1989), are reproduced at Pet. App. 122a-167a.

STATEMENT OF THE CASE

The Court of Appeals agreed in a prior case that the issue presented in the petition raises "significant questions concerning the appointment process for military officers." *Dysart v. United States*, 369 F.3d 1303, 1306 (Fed. Cir. 2004) (reprinted at Pet. App. 82a-106a). Most significantly, this case raises the question whether the plain language of DOPMA — the statute governing military promotions — violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The plain language of DOPMA provides that officers who are nominated for promotion by the President, confirmed by the Senate, and given projected promotion dates by their Service Secretaries are appointed unless they are given statutorily sufficient notice that their promotions are delayed and are then removed from the promotion list within the reasonable, statutorily-prescribed time period. The Court of Appeals nonetheless adopted a tortured interpretation of this clear statutory scheme to avoid what it perceived to be constitutional problems otherwise arising from DOPMA's plain meaning.

The Court should grant review to restore Congress' clear intent in enacting DOPMA and to preserve the rights of thousands of military officers to be promoted in accordance with a clear statutory scheme. Because the question presented generally arises only in the Federal Circuit, the decision below effectively creates a nationwide rule. Absent re-

view, the decision will therefore subject qualified military officers to unwarranted denials or delays of promotion. It will do so contrary to the plain language of DOPMA and Congress' equally clear goal of creating an efficient appointment process for the maintenance of the modern military. And it will do so based on the mistaken constitutional concern that *Marbury*, rather than simply describing the nature of the appointment at issue in that case, instead created an inflexible rule governing *all* appointments over two centuries later.

A petition raising the same principal question presented here is pending before the Court. *See Lewis v. United States*, No. 06-1289 (hereinafter "*Lewis* Pet."). Petitioner respectfully requests that this Court hold his petition pending its decision in *Lewis*. If the Court grants certiorari in *Lewis*, the Court should grant this petition and consider consolidating the cases for argument.

Here, petitioner was not properly notified that his promotion was going to be delayed before the effective date of that promotion. In *Lewis*, the petitioner was not removed from the promotion list until after the statutorily-prescribed time period for such action had passed. The cases are effectively bookends of the DOPMA promotion process. In both cases, the Federal Circuit held that appointments had not been effectuated under DOPMA. Taken together, these cases show not only that this question is recurring but also that regardless of whether the Government's failure to comply with DOMPA occurs at the beginning or the end of the appointment process, the Federal Circuit's interpretation of that statute in *Dysart* continues to result in unwarranted denials of promotion. Further percolation of the question presented is neither necessary nor warranted. The Court should grant review.

A. The Statutory Scheme

This case concerns the meaning and constitutionality of DOPMA, Pub. L. No. 96-513, 94 Stat. 2839 (1980), codified at 10 U.S.C. § 611 *et seq.* (signed into law by President Carter, with technical amendments signed by President Reagan).[1] DOPMA was proposed by the Department of Defense ("DOD") in order to modernize the military's officer personnel law. *See* S. Rep. No. 96-375, at 75 (1980); H.R. Rep. No. 96-1462, at 47 (1980), *partially reprinted in* 1980 U.S.C.C.A.N. 6333. The House Committee on Armed Services likewise recognized that DOPMA's predecessor statute "was drafted at a time when lawmakers could not have foreseen the requirements for large, ready forces on a[] sustained basis" and therefore did not address management issues faced by the modern military. H.R. Rep. No. 96-1462, *supra*, at 9. DOPMA was a reaction to that problem, and, according to the DOD, would "provide the services a more equitable, effective, and efficient system to fill officer force structure requirements and manage the officer corps." *Id.* at 56.

DOPMA's efficient and uniform system governing the promotion of military officers is needed more today than it was when DOPMA was enacted. Literally thousands of officer promotions occur every year in the services. *See, e.g.*, 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006). DOPMA, which governs all such promotions, ensures that they take place when needed to ensure the readiness of our military in the modern era. There can be no question but that DOPMA falls within Congress' core powers. *See* U.S. Const. art. I, § 8 ("The Congress shall have power . . . [t]o raise and support armies . . . [t]o provide and maintain a Navy . . . [and]

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[1] Certain of DOPMA's provisions that are not relevant here were amended in 2006. *See* John Warner Nat'l Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). Citations herein refer to the prior version of the statute.

[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

DOPMA comprehensively prescribes the "appointment" of military officers selected for promotion. It provides that "[a]ppointments . . . shall be made by the President, by and with the advice and consent of the Senate" except in the case of certain low-ranking officers not at issue in this case. 10 U.S.C. § 624(c) (further providing that appointments to the rank of first lieutenant or captain in the Army, Air Force, or Marine Corps, or to lieutenant (junior grade) or lieutenant in the Navy "shall be made by the President alone").[2] The appointment process begins when the Secretary of the relevant military service determines that it is necessary to convene a selection board to recommend the selection of active-duty officers for promotion to the "next higher permanent grade." *Id.* § 611(a). The selection board prepares a report recommending officers for promotion, which is reviewed by the Secretary of the appropriate service, who then forwards the report to the Chairman of the Joint Chiefs of Staff (for certain officers) and to the Secretary of Defense (for all officers). *Id.* §§ 618(a)(1), (b)(1), & (c)(1). The Service Secretaries are not required to accept a report of the selection board and may return the report to the board for further proceedings. *Id.* § 618(a)(2). Likewise, the Chairman may make comments and return a report to the Secretary concerned or in certain circumstances may return the report to the selection board for further proceedings. *Id.* §§ 618(b)(3), (4).

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[2] DOPMA governs promotions for members of the Army, Air Force, Navy, and Marine Corps. The implementing regulation, *see* SECNAVINST 1420.1A, tracks the statute. Similar statutory schemes govern promotions of officers in the Coast Guard, *see* 14 U.S.C. § 271 *et seq.*, and of reserve officers in the Army, Air Force, Navy, and Marine Corps. *See* 10 U.S.C. § 14001 *et seq.*

Once a report is approved by all pertinent officials, the Secretary of Defense transmits it to the President for approval or disapproval. *Id.* § 618(c)(1). The President may remove the name of any officer recommended for promotion on the selection board's report. *Id.* § 629(a).

The list of officers approved for promotion by the President is then submitted to the Senate for its advice and consent. *Id.* § 629(b). If the Senate does not confirm an officer, his or her name is removed from the list. *Id.* If the Senate confirms the officer, on the other hand, he or she "*shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed." *Id.* § 624 (a)(2) (emphasis added).

The Secretary of the relevant service thereafter sets the officer's actual date of "appointment," which is also the effective date of the officer's promotion to the next grade. *Id.* § 741(d)(2) ("Except as otherwise provided by law, the date of rank of an officer who holds a grade *as the result of a promotion is the date of his appointment to that grade.*") (emphasis added); *see also id.* § 624(b)(2). The Secretary informs officers of the projected effective date of their appointment and promotion by transmitting the confirmed promotion list to appropriate personnel. If the Secretary takes no further action, the officer's appointment occurs on that date. *Id.* § 741(d)(2).

The Secretary also has authority to delay the date of an officer's appointment. *Id.* §§ 624(d)(1), (d)(2). For example, the Secretary may delay the appointment if there is "cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." *Id.* § 624(d)(2).[3] DOPMA further provides that

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[3] DOPMA also provides that:

> [t]he appointment of an officer *may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay*, unless it is impracticable to give such written notice *before the effective date of the appointment*, in which case such written notice shall be given as soon as practicable.

Id. § 624(d)(3) (emphases added).

Under the plain language of the statute, then, an officer who is not informed of a delay before the effective date of his appointment — or as soon thereafter as practicable if it was impracticable to inform the officer of the delay before the effective date — is appointed.[4]

> Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if -- [] sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of; [] an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer; [] a board of officers has been convened under chapter 60 of this title to review the record of the officer; or [] a criminal proceeding in a Federal or State court is pending against the officer.

10 U.S.C. § 624(d)(1).

[4] During any period of delay, the Secretary has the authority to decide whether to retain an officer on the promotion list. 10 U.S.C. §§ 624 (d)(1), (d)(2); SECNAVINST 1420.1A ¶ 23(e). Under authority delegated by the President, the Secretary may remove an officer's name from the promotion list during the statutory delay period. SECNAVINST 1420.1A ¶ 23(e); *see also, e.g.*, *Lewis v. United States*, 458 F.3d 1372, 1379 (Fed. Cir. 2006) (reprinted at Pet. App. 107a-121a) (agreeing that the President can delegate both the authority to appoint military officers and the authority to decline to appoint officers) (collecting cases).

DOPMA also creates a maximum period of delay of eighteen months from "the date on which the officer otherwise would have been appointed." 10 U.S.C. § 624(d)(4). At the end of that eighteen-month pe-

Notably, the original version of the statute provided only that "[t]he appointment of an officer" could not be delayed "unless the officer ha[d] been given written notice of the delay." 94 Stat. 2858 (1980). In adding the impracticability exception in 1981, Congress recognized that in some cases officers who it was not practicable to reach before their promotion dates might be promoted simply because they had not been timely notified of a delay. H.R. Rep. No. 97-141, at 14 (1981), *reprinted in* 1981 U.S.C.C.A.N. 24, 37. The legislative history thus confirms the understanding discussed above — that officers not informed prior to their projected promotion date that their appointment is to be delayed will be appointed.

The Secretary's decision to set an effective appointment date and failure to follow clear statutory procedures to delay an officer's promotion, therefore, are the only post-confirmation Executive Branch actions required to effectuate the appointment of an officer to the next permanent grade. DOPMA contemplates that the Executive's failure to comply with its reasonable requirements regarding promotion delays constitutes the exercise of executive discretion in favor of appointment. *See* 10 U.S.C. § 624(a)(2) ("Except as provided in subsection (d) [the delay provision], officers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed.") (emphasis added). The historical record confirms that the Executive Branch fully understands this operation of the statute. Legal memoranda from Joseph Califano, a special assistant to President Lyndon B. Johnson, advised President Johnson to

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riod, unless the officer's name has first been *removed* from the promotion list, that officer is unambiguously promoted under the statute. *See id.* § 624(a)(2). The officer is likewise formally appointed on that date. *Id.* § 624(d)(4); *see also id.* § 624 (b)(2); *Lewis* Pet. at 5-8.

take action on the promotion of certain officers prior to their projected promotion dates or those officers would be "automatically appointed" under DOPMA's predecessor statute. *See* JA 364-66.[5] Indeed, as we shall explain, the government has more recently conceded in litigation conducted in the Court of Federal Claims that, when DOPMA's procedures are not followed, appointments are effectuated as a matter of course.[6]

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[5] Citations to the "JA" refer to the Joint Appendix in the Court of Appeals. The memoranda were obtained from the Lyndon Baines Johnson Library and Museum. *See, e.g.*, JA 365, Dec. 16, 1965 Mem. from Joseph Califano to Pres. Johnson ("Based on these circumstances it is recommended that you remove these officers from the promotion list on the ground that they are not qualified for promotion. [Redacted] will be automatically promoted on December 20 and [redacted] December 18 unless you act before these dates.") (redactions in original); JA 366, Feb. 10, 1966 Mem. from Joseph Califano to Pres. Johnson ("Unless you take the recommended removal action before February 15, 1966 [redacted] will be automatically promoted.") (redaction in original); *see also* JA 364, Dec. 13, 1965 Mem. from James Cross for Joseph Califano ("Presidential approval for the withdrawal of [officers'] names will be necessary in the case of Lieutenant [redacted] before 18 December and for Captain [redacted] before 20 December. These are the dates when the officers complete the service required for advancement to the next higher permanent grade.") (redactions in original).

[6] This operation of DOPMA does not saddle the armed forces with flawed officers. After an officer is promoted, the President and the Service Secretaries of course retain the power to dismiss or otherwise discipline those officers. *See, e.g.*, 10 U.S.C. § 625 (providing that the President may vacate promotions to Brigadier General and Rear Admiral (lower half) within eighteen months after promotion); *id.* § 801 *et seq.* (providing for dismissal and other sanctions pursuant to the Uniform Code of Military Justice); *id.* § 1161(b) (providing that the President may drop a commissioned officer from the rolls in certain circumstances); *id.* §§ 1181, 1182 (providing for boards of inquiry to determine whether an officer should be retained on active duty).

B. Factual Background

The petitioner, Danny T. Barnes, enlisted in the United States Navy in 1983. He rose through the ranks and was promoted to Lieutenant in 1992. He was then selected on schedule for promotion to Lieutenant Commander in the Cryptology competitive category. The President nominated him to that rank on October 29, 1997. 143 Cong. Rec. S11390-91 (daily ed. Oct. 29, 1997). He was confirmed by the Senate on November 8, 1997, *id.* at S12214-15 (daily ed. Nov. 8, 1997), and given a projected promotion date of April 1, 1998. JA 403.

On February 4, 1998, however, the Naval Security Group Command transmitted a report to the Chief of Naval Personnel of a non-judicial punishment proceeding ("NJP") against Mr. Barnes conducted in 1997 at Naval Security Group Activity ("NSGA") Misawa, Japan. The Commander of the Naval Security Group Command recommended that Mr. Barnes be removed from the Lieutenant Commander promotion list and required to show cause for retention in the naval service.[7] JA 383. Subsequently, the Deputy Chief of Naval Operations was informed that Mr. Barnes would not be included on the April 1, 1998 transmission listing officers who had been promoted. JA 384. On March 17, 1998, a memorandum from the Chief of Naval Personnel to Mr. Barnes stated his April 1, 1998 promotion was being delayed. The memorandum noted the NJP and stated that the promotion was delayed until "all related administrative or disciplinary

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[7] The NJP was held on November 24, 1997, and Mr. Barnes was awarded seven days' restriction. Based on the NJP, Mr. Barnes' Commanding Officer recommended that his promotion to Lieutenant Commander be delayed so that he would be the last officer promoted in his year group. Because he "ha[d] the potential to be a strong, positive asset for the Navy," his Commanding Officer did not recommend that his promotion be withheld or that he be required to show cause for retention in the Navy. JA 78.

action [was] completed." JA 46. A certified mail receipt indicates that this memorandum was sent to Mr. Barnes via NSGA Misawa, where he was stationed, on March 23, 1998. JA 385.

At that time, Mr. Barnes was deployed to the USS *John S. McCain* in the Persian Gulf. On March 30, 1998, while still at sea, he was informed by e-mail that a Board of Inquiry would be conducted regarding his retention in the Navy. He was not, however, informed that his promotion, scheduled to take place the next day, had been delayed.[8] JA 405. On April 9, 1998, *over a week after Mr. Barnes' projected promotion date*, the Executive Officer at NSGA Misawa sent an e-mail to the Bureau of Naval Personnel ("BuPers") to inform it that he had received the letter stating Mr. Barnes' promotion would be delayed and a package regarding the Board of Inquiry but did not want to mail Mr. Barnes these documents because he was concerned that they would be delayed or that Mr. Barnes would be on his way back by the time the letters reached the *McCain*. JA 114.

The government has never disputed that Mr. Barnes was reachable aboard the *McCain* by a variety of means other than regular mail, including e-mail, fax, telephone, and electronic message. JA 403-05. Indeed, while still at sea, he was informed by e-mail from NSGA Misawa on April 15, 1998, *two weeks after his projected April 1 promotion date*, that his promotion was being delayed. JA 406. Mr. Barnes did not receive the memorandum notifying him of the delay and the grounds for it until he returned to NSGA Misawa from the *McCain* on April 21, 1998, *three weeks after his projected promotion date*. JA 114. Thus, although the Navy had known about the reasons underlying Mr. Barnes' promo-

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[8] Indeed, beginning on his projected promotion date of April 1, 1998, Mr. Barnes received pay at the higher rank of Lieutenant Commander for approximately one year but was later asked to repay the difference. JA 406.

tion delay since November 1997, it did not take action to delay his promotion until March 1998, did not notify him in any way of his promotion delay until two weeks after his projected promotion date even though he was reachable at sea before that date, and did not give him the official memorandum setting forth the grounds for the delay until yet another week had elapsed.

Mr. Barnes submitted a response to the promotion delay on April 25, 1998 that included supporting letters from his superiors.[9] On May 27, 1998, the Board of Inquiry determined that Mr. Barnes had engaged in conduct unbecoming an officer but recommended that he be permitted to remain in the Navy. JA 125-26. Nevertheless, in a series of procedurally deficient steps, the Navy further extended his promotion delay, JA 130, and ultimately removed his name from the promotion list. JA 132. In 2001, Mr. Barnes was again passed over for promotion and was released from active duty. JA 145, 151. He became a member of the Naval Reserve, from which he resigned in 2003. JA 149-50.

C. Procedural History

1. On October 21, 1999, Mr. Barnes filed suit in the Court of Federal Claims, alleging, *inter alia*, that his promotion occurred as a matter of law because the delay did not comport with statutory and regulatory procedures and that he was therefore entitled to back pay and reinstatement in the

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[9] For example, the Commanding Officer of the *McCain* wrote: "I awarded LT Barnes a Navy Achievement Medal for his superb performance while aboard the JOHN S. MCCAIN. . . . Promote LT Barnes to LCDR now and only assign him to the most challenging billets." JA 117-18. The ship's Executive Officer also supported Mr. Barnes' promotion, stating: "LT Barnes has been a tremendous asset to this command and to the overall mission of this battle group as a whole. . . . Based on his superior performance at this command, I highly endorse his promotion to Lieutenant Commander and future retention in the Naval service." JA 119.

Navy.[10] That court granted Mr. Barnes' motion for judgment on the administrative record, rejecting the government's argument that Mr. Barnes was not promoted because the President has ongoing discretion to remove an officer's name from the promotion list at any time. Pet. App. 74a-76a. The Court found several defects in the Navy's handling of Mr. Barnes' promotion to Lieutenant Commander and, with respect to whether Mr. Barnes had been timely notified of the initial delay of his promotion, observed that "[c]learly communication via email was possible" while he was at sea. Pet. App. 68a.

At the time the Court of Federal Claims reached its decision in this case, another decision of that court fully supported Mr. Barnes' reading of DOPMA. *Rolader v. United States*, 42 Fed. Cl. 782 (1999), held that an officer whose name was never removed from the promotion list before the last possible date of statutory delay had been "promoted" under DOPMA — precisely the reading Mr. Barnes asserted regarding the Navy's improper actions in his case. Indeed, the government conceded the point in *Rolader*. *See id.* at 786 (stating that "[t]he Government *concedes* that if no recommendation for removing plaintiff's name from the promotions list was initiated prior to [the last date of possible delay], he was *automatically promoted*, irrespective of the subsequent removal") (emphases added).

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[10] The Court of Federal Claims had Tucker Act jurisdiction because Mr. Barnes sought back pay under the Military Pay Act, 37 U.S.C. § 204. While this case was pending before that court, Mr. Barnes applied to the Board for Correction of Naval Records ("BCNR") for a determination that he had been promoted to Lieutenant Commander because the Navy failed to follow the required procedures in delaying his promotion. The litigation was stayed pending resolution of the BCNR proceedings. The BCNR denied his application and also denied on reconsideration. JA 48-49, 51-52.

2. While proceedings regarding the appropriate amount and nature of relief continued in Mr. Barnes' case, the government took precisely the opposite view in *Dysart*, persuading the Federal Circuit in that case that an officer whose name is removed from the promotion list after the prescribed statutory period has ended is *not* promoted under DOPMA because DOPMA does not provide for appointments. *Dysart* held that the President has discretion under DOPMA to remove an officer's name from the list at any time. 369 F.3d at 1311, 1315-17 (deciding issue without reference to contrary Court of Federal Claims precedent). This holding was driven by the Federal Circuit's belief that a decision interpreting DOPMA according to its plain language would raise questions regarding the Appointments Clause and the interpretation of *Marbury v. Madison*. *See Lewis* Pet. at 12-13, 23-28. The Federal Circuit concluded that interpreting DOPMA in the manner Dysart proposed — as providing for the promotion of a nominated, confirmed officer unless statutory procedures for removing the officer's from the promotion list are complied with — would impermissibly encroach on executive power and violate *Marbury*. *Dysart*, 369 F.3d at 1314; *see also Lewis*, 458 F.3d at 1378-79.[11]

3. Following *Dysart*, the Federal Circuit reversed the lower court in this case, summarily concluding (without any citation to the record) that providing Mr. Barnes with notice of the delay before the effective date of his promotion was impracticable because he was at sea. Pet. App. 11a. Without explaining why a harmless error analysis was even appropriate, it also concluded that even if there was a procedural defect, it was harmless: "Barnes did not suffer any prejudice, as he promptly submitted his written response as soon as he

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[11] On the basis of this intervening precedent, the Court of Federal Claims reconsidered its prior decision in this case. Pet. App. 17a. The court vacated its prior holding that Mr. Barnes had been promoted under DOPMA in light of *Dysart* but granted relief on other grounds.

returned to Japan." Pet. App. 11a. Finally, the Court of Appeals rejected Mr. Barnes' cross-appeal in which he asked the Court to reconsider its *Dysart* decision *en banc*. Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

This case, *Lewis*, and others like them raise significant and recurring questions regarding how military officers are promoted — questions that potentially impact thousands of officers each year and require analysis of whether DOPMA violates *Marbury* and the Appointments Clause by creating a statutory scheme that provides for an efficient and modern appointments process. The Federal Circuit's interpretation of the statute is deeply flawed and rests on an erroneous premise regarding the separation of powers and *Marbury*. Properly understood, DOPMA neither vests Congress with any appointment power nor encroaches on the power of the Executive Branch. The statute clearly has the effect that Mr. Barnes attributes to it, and that effect is compatible with the Constitution.

Because it has exclusive jurisdiction over claims asserted by military officers seeking back pay, the Federal Circuit is in all likelihood the only court of appeals that will have the opportunity to pass on this issue. Absent review, its decisions, including the decision below, will wrongly inject uncertainty into an area where certainty and predictability are paramount; thousands of officers proceed through the military promotions system each year, and the efficiency of this system is integral to the national defense effort. There is no chance that the Federal Circuit will correct its own error in interpreting DOPMA. In this case, the Federal Circuit based its decision on a casual and blatantly incorrect holding regarding whether DOPMA's notice provision had been complied with in an effort to avoid grappling with the implications of its decision in *Dysart*. Pet. App. 12a (stating that it would reach neither the government's nor Mr. Barnes' ar-

guments based on *Dysart*). Twice since *Dysart*, the Court of Appeals has unequivocally refused to revisit that decision and thus reaffirmed that petitioner's reading of DOPMA violates *Marbury* and the Appointments Clause. The Court should grant the petition.

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

A. The Question Is Recurring

Literally thousands of military appointments take place each year. From January 3 through September 30, 2006 alone, the Senate confirmed 7,783 Air Force nominees, 8,831 Army nominees, 6,694 Navy nominees, and 1,289 Marine Corps nominees. *See* 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006). DOPMA governs the appointment of all active duty military officers. It is hardly surprising that the question presented here is a recurring one. To the contrary, this Court currently has before it another petition raising this very question and — as this case itself demonstrates — it has repeatedly been the subject of litigation in the Court of Federal Claims and the Federal Circuit. *See, e.g.*, Pet. App. 1a-106a (reproducing the three lower court decisions in this case); *Lewis*, 458 F.3d 1372; *Dysart*, 369 F.3d 1303; *Rolader*, 42 Fed. Cl. 782; *see also Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993) (raising same issue under statute governing Coast Guard promotions). These questions also regularly arise before the BCNR and its sister boards for the other armed forces. *See, e.g.*, Amicus Br. of Mr. Barnes, et al., in *Dysart v. United States*, 2003 WL 24305578, at *3.

B. The Question Is Important

The Federal Circuit acknowledged that these cases "present[] significant questions concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306. As explained in Dr. Lewis' petition, the Court of Appeals is correct on that score. *See Lewis* Pet. at 15-17.

First, this case implicates the interpretation of an important federal statute governing the appointment of thousands of military officers every year. In *Dysart* and *Lewis*, the Federal Circuit disguised what is essentially a constitutional holding that DOPMA violates *Marbury* and the Appointments Clause as a holding that DOPMA's plain terms mean something other than what they say. The outcome of this case was a foregone conclusion given that interpretation.

But the Court of Appeals' interpretation cannot survive serious scrutiny. DOPMA provides that Mr. Barnes was "appointed" to the next higher rank on his projected promotion date because he was not previously given proper statutory notice of the delay, nor was it impracticable for the Navy to give him such notice. The Court of Appeals' holding that any defect in the notice given Mr. Barnes was harmless error flows from its misreading of the statute as failing to provide for automatic appointments. The prejudice to Mr. Barnes — the loss of a valuable promotion resulting in his subsequent involuntary release from active duty — is clear when the statute is read in a straightforward fashion. The Federal Circuit's holding also illustrates the limbo in which its interpretation of DOPMA places military officers — that interpretation imposes a system under which the President or his delegate can delay military promotions and remove officers from the promotion list at any time without regard to DOPMA.

Second, this case raises core questions about the separation of powers. The statutory scheme is critical to maintaining an efficient military appointment process, and the appointment of military officers is unquestionably an area in which Congress has a significant interest in light of its broad constitutional powers to maintain a navy and regulate other military affairs. *See* U.S. Const. art. I, § 8. In *Lewis* and *Dysart*, the Federal Circuit made clear that it viewed DOPMA as encroaching on Executive power. That court, however,

did not even acknowledge that in enacting DOPMA Congress was legislating in an area involving its core powers or consider the possibility that DOPMA is a balanced approach to military promotions that respects the appointments system and also carries out Congress' duty to provide for and regulate the armed forces. *See Lewis* Pet. at 15-17.

Third, these cases raise the issue whether *Marbury* created an inflexible constitutional rule regarding what Executive action is necessary to effectuate any and all appointments under the Constitution. The Federal Circuit based its analysis on a flawed reading of *Marbury*. It did not grapple with the question whether Congress could vary in any way the way in which the steps in the appointment process are accomplished. The Court should grant review to determine whether *Marbury*'s *description* of the appointment at issue in that case in fact created a baseline constitutional rule governing all appointments over two centuries later.

C. Absent The Court's Review, The Court Of Appeals' Decision Creates A Nationwide Rule Governing The Appointment Of Military Officers

Claims like Mr. Barnes' are litigated exclusively in the Federal Circuit, because it is the only court with jurisdiction to hear appeals regarding officers' claims for back pay and retirement pay at the level applicable to the ranks to which they assert they were promoted. *See* 28 U.S.C. §§ 1295(a)(2), (3); *see also United States v. Hohri*, 482 U.S. 64, 72 (1987); *Lewis* Pet. at 17-18. —

Two judges of the Court of Federal Claims, including in this case, have read DOPMA to provide for military promotions without raising any constitutional issues. *See* Pet. App. 76a (holding that the Navy's delay in removing Lieutenant Barnes from the promotion list until after the statutory delay period had expired "accomplished his promotion"), *opinion vacated*, 66 Fed. Cl. 497 (reversing prior holding in light of *Dysart*), and *Rolader*, 42 Fed. Cl. at 787 (holding that be-

cause officer's name was not removed from promotion list prior to the expiration of the delay period, he was promoted as a matter of law).

The Federal Circuit nevertheless decided *Lewis* solely based on its prior holding in *Dysart* and denied rehearing. *See Lewis*, 458 F.3d at 1379 (resolving Dr. Lewis' argument that she had been promoted because her name was not removed from the promotion list by the last possible date of statutory delay based on *Dysart* because *Dysart* was binding on the panel and "Lewis' claim is not distinguishable"). The Federal Circuit refused to reconsider *Dysart* again here and engaged in no analysis of DOPMA's language at all. *See* Pet. App. 13a ("Barnes himself recognizes that this panel is bound to follow *Dysart* unless and until it is overturned by the court sitting en banc. We therefore do so and reject the cross-appeal. Nor are we persuaded, as requested, to propose en banc review ourselves."). The Federal Circuit has thus conclusively demonstrated that it will not revisit this issue. Absent review, the decision below will create a *de facto* nationwide rule.

II. THE DECISION BELOW WRONGLY SUBJECTS THOUSANDS OF MILITARY OFFICERS TO UNWARRANTED PROMOTION DENIALS AND DELAYS

A. DOPMA's Plain Language Provides For Appointment When Notice Of A Delay Is Not Properly Given

In this case, the Federal Circuit refused to reconsider its flawed interpretation of DOPMA as set forth in *Dysart*.[12] Under the plain language of DOPMA, an officer nominated for promotion by the President, 10 U.S.C. §§ 618(c)(1),

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[12] The flaws in the Federal Circuit's interpretation of DOPMA are discussed in greater detail in Dr. Lewis' petition. *See Lewis* Pet. at 19-22.

629(b), considered and confirmed for that office by the Senate, *id.* § 629(b), and assigned a projected promotion date by a Service Secretary, *id.* §§ 624(b), 741(d), is appointed on his projected promotion date absent statutorily sufficient notice that his appointment will be delayed. *Id.* § 624(d). Such notice must be given prior to the officer's projected promotion date and, absent notice, the officer will be promoted on that date unless giving prior notice is impracticable. *Id.* § 624(d). The notice provision ensures that officers are timely informed of any change in their promotion status and is merely a reasonable limitation on the statutorily-recognized executive power to delay or prevent the effectuation of a promotion.

The history of the notification provision confirms this understanding. When DOPMA was passed in 1980, it provided only that "[t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the delay." 94 Stat. 2858. This language was amended in 1981, when Congress added the phrase "unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." Defense Officer Personnel Management Act Technical Corrections Act, Pub. L. No. 97-22 § 4(d)(3)(D), 95 Stat. 127. The House Report to that amendment noted that under the language of the original provision, an officer might be promoted simply because notice of a delay had not been transmitted to him or her in a timely fashion:

> This amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or while absent

> without leave) to receive written notice that the promotion is being delayed.

H.R. Rep. No. 97-141, *supra*, at 14. This impracticability exception would be meaningless under the Federal Circuit's reading of the statute. If notice were not necessary *at all* to delay or prevent the effectuation of a scheduled promotion, Congress would have had no reason to add an impracticability exception.

The Federal Circuit considered neither the plain language of DOPMA nor the legislative history of the notice provision in reaching its decision in this case, constrained as it was by its opinion in *Dysart*. As discussed below, the constitutional concerns underpinning that decision are unfounded.

B. DOPMA Does Not Violate The Appointments Clause

The Federal Circuit's strained statutory construction in *Dysart*, which has since been reaffirmed in *Lewis* and the decision below, was colored by the underlying premise of its decision — namely, the court's belief that the statute raised Appointments Clause problems because: (1) the President has absolute discretion regarding whether to appoint an officer who has been confirmed to the next highest rank and grade; and (2) the "shall be promoted" language of the statute improperly cabins that discretion. *See, e.g.*, *Lewis*, 458 F.3d at 1378-79 (noting that in *Dysart* the court "further held that the statute could not constitutionally provide for automatic appointment because 'military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute'") (quoting *Dysart*, 369 F.3d at 1315); *Dysart*, 369 F.3d at 1314 (stating that "[p]rotecting the role of the President in the appointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention"); *see also id.* at 1316 ("The Constitution contemplates that, after confirmation, the

President may refuse to execute the appointment."). Under the Federal Circuit's view of the Appointments Clause, therefore, no limits may be placed on the President's discretion to appoint or choose not to appoint officers. As discussed more fully in Dr. Lewis' petition, that view is incorrect. *See Lewis* Pet. at 23-29.

First, this Court has held that the Appointments Clause is violated when Congress enlarges its own power during the appointments process. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress could not constitutionally provide for appointment of members of the Federal Election Commission by the President *pro tempore* of the Senate and the Speaker of the House). DOPMA does not involve any expansion of congressional power. The only power Congress retains under the statute is the Senate's power to confirm (or choose not to confirm) military officers. Contrary to the Federal Circuit's view, the President and his delegates maintain their discretion. The critical decisions at issue under the scheme — whether to nominate an officer for promotion, whether to allow the promotion of a confirmed officer to go through as scheduled or to delay that promotion, whether to remove the officer's name from the promotion list during any delay, and of course whether to remove or discipline an officer who has already been promoted — all still rest with the Executive. All DOPMA requires is that notice of a delay be given before the effective date of an appointment unless it is truly impracticable to do so, and that executive discretion be exercised within a reasonable time frame.

Second, rather than violating the separation of powers, DOPMA instead strikes a necessary balance between the President's power in the area of appointments and Congress' core constitutional power to provide for and regulate the military. This Court "ha[s] never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison v. Olson*, 487 U.S. 654,

693-94 (1988) (internal quotation marks omitted). When proposing and enacting DOPMA, the DOD and Congress both recognized the need for an efficient, modern process to manage the high volume of promotions in today's military. *See* S. Rep. No. 96-375, *supra*, at 75; H.R. Rep. No. 96-1462, *supra*, at 9, 47, 56. The reasonable procedures governing military promotions set forth in the Act are simply mechanisms to ensure that this need is met and thus fall squarely within Congress' core powers. *See* U.S. Const. art. I, § 8.[13]

Third, DOPMA does not violate *Marbury*. The Federal Circuit was wrong to assume that *Marbury* requires the appointments process to occur in a particular manner.[14] *Mar-*

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[13] If there were any doubt about this conclusion, it is resolved by the fact that Congress has greater flexibility in the appointment of inferior officers like Mr. Barnes. *See, e.g., Weiss v. United States*, 510 U.S. 163, 186-87 (1994) (Souter, J., concurring). In particular, Congress may vest the appointment of these officers in the President alone or in other government entities. U.S. Const. art. II, § 2, cl. 2. The Federal Circuit in *Dysart* recognized that Congress may vary the appointments process for such officers, 369 F.3d at 1314, but utterly failed to address the import of this fact for the appointment of military officers. It is true that Congress has not chosen to vary the appointment process for most military officers. However, given its greater power to disregard the role of the President in the appointments process for inferior officers altogether, it follows that Congress must, at the very least, have the flexibility to set up a scheme for the appointment of officers that ensures all the constitutionally required steps of the military promotion process occur as efficiently as possible. That is all that it has done with the current statutory framework.

[14] Under the Federal Circuit's interpretation, giving the President unfettered discretion in appointments, Congress would never be able to craft efficient appointments schemes and the statutes currently providing similar mechanisms for appointments in the Coast Guard and the reserve officer corps, *see* 14 U.S.C. § 271 *et seq.* and 10 U.S.C. § 14001 *et seq.*, would be unconstitutional. Moreover, taking the Federal Circuit's position to its logical extreme, Congress would never be able to require that military officers have any particular qualifications for their positions as the Executive Branch would have unlimited decision-making power regarding who is nominated and appointed to be an officer. As even the

bury does not create any rule, much less a *constitutional* rule, regarding the precise action required to effectuate an appointment under all circumstances. Rather, it generally provides that an appointment is made "when it is shewn that [the President] has done every thing to be performed by him." *Marbury*, 5 U.S. at 157.[15] Mr. Barnes and other officers like him are nominated by the President under a statute that the President understands will make a confirmed officer's appointment effective unless the officer is properly notified of a delay and his or her name is then removed from the promotion list. Thus, the President's nomination and the Executive's failure to take subsequent action that complies with statutory procedures to delay or prevent the appointment is the showing *Marbury* requires — that the President "has done every thing to be performed by him." *Id.* (also stating that "this [appointment] power has been exercised when the last act, required from the person possessing the power, has been performed").

III. THE COURT CAN REACH THE STATUTORY AND CONSTITUTIONAL ISSUE IN THIS CASE

The Federal Circuit's cursory conclusion that it was impracticable to afford Mr. Barnes prior notice poses no impediment to this Court's review of the important issues discussed above. The impracticability exception to DOPMA's normal notice requirement was intended to apply to officers who are not at their place of duty for one reason or another, not to those who are on duty and capable of being reached.

Court of Appeals has acknowledged, that is simply not the law. *See Lewis*, 458 F.3d at 1379 (recognizing that "Congress can restrain the President's authority to appoint particular classes of persons to officer positions or bar appointment unless particular procedures are followed").

[15] Moreover, *Marbury* dealt with a particular appointment process; it did not foreclose the possibility that other processes could also satisfy the requirements of the Appointments Clause.

See H.R. Rep. No. 97-141, *supra*, at 14. The Federal Circuit nonetheless rested its decision on the notion that it was impracticable to notify Mr. Barnes of the delay of his promotion before the effective date because he was at sea. Pet. App. 11a. Because the facts surrounding provision of notice to Mr. Barnes were undisputed, the Federal Circuit's impracticability determination is a legal conclusion subject to *de novo* review. *E.g.*, *Imperial Cas. & Indem. Co. v. Chicago Housing Auth.*, 987 F.2d 459, 461 (7th Cir. 1993) (requirement that notice be served "as soon as practicable" subject to analysis as matter of law if facts are undisputed); *see also SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988) (interpreting "practicable" *de novo* according to plain meaning).

There is no dispute that the Navy could have communicated with Mr. Barnes when he was aboard the *McCain*. Indeed, it did communicate with him, sending him at least two official e-mails during his deployment, including one on March 30, 1998 regarding the Board of Inquiry. JA 405, 406.[16] To comply with the statutory notice requirement, the Navy could simply have sent him another such e-mail before his April 1, 1998 projected promotion date. Furthermore, it had telephone, fax, and electronic communication with the *McCain* at all pertinent times.[17]

The fact that an officer in Japan thought there were reasons to defer providing Mr. Barnes that notice, *see* page 11,

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[16] "On or about March 30, 1998, while I was still aboard the *McCain*, NSGA Misawa advised me by email that my case was being referred to a Board of Inquiry (BOI). There was no mention of a promotion delay. . . . On April 15, 1998, while I was still aboard the *McCain*, NSGA Misawa advised me by email that my promotion had been delayed." JA 405-06.

[17] Mr. Barnes confirmed this in his uncontested declaration. "The ship also had fax and email capability. During the time I was aboard, there were no interruptions in the *McCain*'s ability to communicate with the rest of the Navy." JA 405.

supra, is irrelevant. *E.g.*, American Heritage Dictionary 882 (4th ed. 2000) (impracticable means "*impossible* to do or carry out") (emphasis added); Random House Webster's Unabridged Dictionary 962 (2d ed. 2001) (impracticable means "*incapable* of being put into practice *with available means*") (emphases added); *see also* Pet. App. 68a. DOPMA requires an inquiry into whether notice was practicable, not whether an officer subjectively considers notice practicable.[18] The Federal Circuit's impracticability determination here was plainly wrong, and should not be permitted to insulate the court's otherwise incorrect decision from review.[19] The

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[18] This Court had occasion last Term to consider two different uses of the term "practicable" in Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836 (2000) ("UCMJ"). One required the President to prescribe regulations for military tribunals that "so far as he *consider[ed]* practicable" complied with the laws and rules generally recognized for the trial of criminal cases in the district courts; the other simply stated that all rules and regulations for military commissions and courts-martial "shall be uniform insofar *as* practicable." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2790 (2006) (emphases added). The Court observed that a determination as to whether something *is* practicable is different from a determination as to whether something is *considered* practicable. *Id.* at 2790-92. Because DOPMA requires notice before the effective date of a promotion "unless it *is* impracticable," 10 U.S.C. § 624(d)(3) (emphasis added), it falls in the former category and determinations under it are entitled to reduced deference, if any. *See Hamdan*, 126 S. Ct. at 2792 & n.51; *see also id.* at 2801 (Kennedy, J., concurring) (difference between the two UCMJ subsections "suggests, *at the least*, a lower degree of deference for . . . determinations" under the second subsection) (emphasis added). No amount of deference saves the Navy's failure to give prior notice in this case because the Navy was in communication with the *McCain* (and therefore Mr. Barnes) at all times.

[19] The Federal Circuit's alternative holding that any defect in the notice Mr. Barnes received was harmless, Pet. App. 11a, assumes the correctness of its interpretation of DOPMA. If DOPMA does not provide for appointments where the delay provisions have not been complied with, as the Federal Circuit held in *Dysart* and reiterated in *Lewis*, then a failure to give notice of a delay prior to a projected promotion date could indeed be harmless because the officer would have no expectation of

Court should resolve the Court of Appeals' clear errors and grant review to reach the important main issue presented.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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May 4, 2007

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appointment under the statute. But if DOPMA *does* provide for appointments, as Mr. Barnes contends and as the Court of Federal Claims held initially here and in *Rolader*, the error cannot be harmless. As the Court of Federal Claims correctly recognized, the prejudice is "self-evident": the improper notice led to "improper delays in [Mr. Barnes'] promotion, the subsequent removal of his name from the promotion list and consequent imputed nonselection and involuntary termination from the Navy." Pet. App. 26a.

APPENDIX A

Danny T. BARNES, Plaintiff-Cross Appellant,

v.

UNITED STATES, Defendant-Appellant.

Nos. 06-5030, 06-5036.

United States Court of Appeals, Federal Circuit.

Jan. 4, 2007.

Background: Former Navy officer brought suit against the United States, alleging that his involuntary discharge after being passed over for promotion was improper because his promotion to lieutenant commander occurred by operation of law. Vacating opinion at 57 Fed. Cl. 204, granting officer's motion for judgment on the administrative record, the Court of Federal Claims, James F. Merow, Senior Judge, 66 Fed. Cl. 497, entered judgment for officer. United States appealed.

Holdings: The Court of Appeals, Michel, Chief Judge, held that:

(1) alleged procedural defects concerning Navy's decision to remove officer's name from promotion list were subject to judicial review;

(2) Navy complied with all relevant statutory and regulatory procedures in delay of lieutenant's promotion; and
(3) because there was no procedural error in the delay of his promotion, later removal of lieutenant's name from promotion list occurred during a lawful delay period, so his first nonselection was valid and he was properly discharged following his second nonselection.

Reversed.

Eugene R. Fidell, Feldesman Tucker Leifer Fidell LLP, of Washington, DC, argued for plaintiff-cross appellant. With him on the brief was Matthew S. Freedus.

Douglas K. Mickle, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Bryant G. Snee, Assistant Director. Of counsel on the brief was Captain Thomas B. Merritt, Jr., General Litigation Division, Office of the Judge Advocate General, United States Department of the Navy, of Washington, DC. Of counsel was Lt. Cdr. Thomas F. Leary.

Before MICHEL, Chief Judge, LINN and PROST, Circuit Judges.

MICHEL, Chief Judge.

This case concerns a Navy officer who was involuntarily discharged following his second non-selection for promotion, in accordance with 10 U.S.C. § 632(a). The government appeals from a final judgment of the United States Court of Federal Claims, reinstating Danny T. Barnes

as a lieutenant, with back pay. The trial court ruled on the administrative record that there was an unlawful delay in his promotion while certain misconduct was further evaluated by high Navy officials. *Barnes v. United States*, No. 99-883 C (Fed. Cl. Oct. 7, 2005). Barnes cross-appeals, seeking reversal of *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), which precluded him from being promoted to lieutenant commander by operation of law, the relief he initially sought below. We reject the cross-appeal, but conclude that the court erred in finding the first non-selection invalid where, we hold, the Navy adhered to the relevant statutory and regulatory procedures in delaying his promotion and later removing his name from the promotion list. We therefore reverse.

I. BACKGROUND

The underlying facts are well-summarized by the two thorough opinions below and will not be set forth in similar detail here. *See Barnes v. United States*, 66 Fed. Cl. 497, 497-98 (Fed. Cl. 2005) ("*Barnes II*"); *Barnes v. United States*, 57 Fed. Cl. 204, 208 (Fed. Cl. 2003) ("*Barnes I*"). Briefly, Barnes enlisted in the Navy on June 20, 1983. He rose through the ranks and was promoted to lieutenant on June 1, 1992. Barnes was selected by a board for promotion to lieutenant commander in the competitive category of special duty officer (cryptology) on April 30, 1997. His nomination was confirmed by the Senate on November 8, 1997.[1] *See* 143 Cong. Rec. S12214 (daily ed. Nov. 8, 1997) (confirming those nominations received by the Senate and appearing at 143 Cong. Rec. S11390 (daily ed. Oct. 29, 1997)). His promotion never became effective, however,

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[1] In fact, Barnes received pay at the higher rank for one year starting on April 1, 1998, his projected promotion date, but was later asked to pay back the difference of approximately $2,500.

because he was later disciplined for attempting to arrange off-duty liaisons with five enlisted women, two of whom were his subordinates.

Following Barnes' non-judicial punishment proceedings concerning that misconduct, a formal objection to his promotion was lodged by a lieutenant commander in the Performance Division of the Navy on February 19, 1998. Barnes subsequently received notice that his promotion was delayed "until all related administrative or disciplinary action is completed." Although that notice letter was dated March 17, 1998, Barnes was aboard the USS John S. McCain in the Persian Gulf at the time; thus, he did not receive it until April 21, 1998, when he returned to his base at Misawa, Japan.[2] He responded promptly on April 25, 1998, enclosing four character references. On May 1, 1998, Barnes' commanding officer in Japan supported his promotion to lieutenant commander, but recommended that his promotion be delayed such that he would be the last in his year group to be promoted.

Meanwhile, on March 19, 1998, Barnes was directed to show cause why he should be allowed to remain in the Navy, on the basis of the same misconduct. On May 26, 1998, a Board of Inquiry ("BOI") was appointed. On May 27, 1998, the BOI unanimously found that Barnes had engaged in conduct unbecoming an officer, failed to demonstrate acceptable qualities of leadership, and failed to conform to prescribed standards of military deportment; nonetheless, by a vote of 2 to 1, it recommended retaining him in the Navy.

Ratification and extension of the initial delay in Barnes' promotion to lieutenant commander was requested by the

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[2] Barnes, however, acknowledges receiving email notification of his promotion delay on April 15, 1998.

Bureau of Naval Personnel on August 14, 1998 and approved by the Assistant Secretary of the Navy on August 24, 1998. On September 8, 1998, Barnes was notified that the Secretary of the Navy was considering the removal of his name from the promotion list. He responded by letters dated September 24, 1998 and November 3, 1998. In addition, his commanding officer wrote two letters of endorsement, dated October 2, 1998 and November 18, 1998. A memorandum addressed to the Special Assistant Congressional Liaison Office, dated December 14, 1998, indicated that Barnes' suitability for promotion was still being reviewed by the chain of command. On March 22, 1999, the Chief of Naval Personnel determined that Barnes was not qualified for promotion to lieutenant commander and requested removal of his name from the promotion list; the Secretary of the Navy approved on April 26, 1999, and Barnes was notified on May 7, 1999. The removal of his name was deemed a non-selection for promotion pursuant to 10 U.S.C. § 629(c)(2). Subsequently, he was again considered for promotion by the next selection board. Following Barnes' second non-selection for promotion, he was involuntarily discharged, pursuant to 10 U.S.C. § 632(a), on March 1, 2001.

Barnes subsequently accepted a reserve commission as a lieutenant in the Independent Ready Reserves and received $72,107.28 in separation pay. On July 15, 2003, he tendered his resignation to the Naval Reserve Personnel Center, which ended his obligation to the United States Navy. The Navy accepted his resignation by letter dated July 29, 2003, and Barnes was honorably discharged from the United States Naval Reserve, effective July 17, 2003.

* * *

On October 21, 1999, Barnes filed suit in the Court of Federal Claims. He alleged that the delay in his promotion

and the ultimate removal of his name from the promotion list were not in accordance with statutory and regulatory procedures. *Barnes I*, 57 Fed. Cl. at 205. He further contended that the failure of the Navy Board for Correction of Military Records ("BCNR") to grant him relief was contrary to law or arbitrary and capricious.[3] *Id.* In ruling on cross-motions for judgment on the administrative record, the court agreed with Barnes that there had been various procedural violations such that the delay was improper and had no effect on his promotion; in other words, the court below ruled that Barnes had been promoted by operation of law under 10 U.S.C. § 624(a)(2). *Id.* at 218-19. Having ruled that the BCNR's denial of relief was thus contrary to law, the court declined to reach the issue of whether its reliance on the unclean hands doctrine was arbitrary and capricious. *Id.* at 221.

This decision was revisited in the wake of *Dysart*, which held that 10 U.S.C. § 624 "does not provide for automatic appointment without action by the President." 369 F.3d at 1313. Barnes conceded that his first three causes of action, seeking promotion to lieutenant commander by operation of law,[4] had to be dismissed in light of *Dysart*. *Barnes II*, 66 Fed. Cl. at 499. His alternative argument--that he was

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[3] Barnes filed his Application for Correction of Naval Records on May 16, 2000. At his request, the Court of Federal Claims stayed this litigation pending the BCNR's decision. It denied relief on January 11, 2001 and denied reconsideration on December 19, 2001. *See Barnes II*, 66 Fed. Cl. at 498.

[4] Barnes' first cause of action alleged procedural error when he was not notified of his promotion delay until after its effective date, in violation of 10 U.S.C. § 624(d)(3) and SECNAVINST 1420.1A ¶ 23c. His second cause of action alleged that the delay in his promotion expired on May 27, 1998. His third cause of action alleged that he was not provided notice, as required by § 624(d)(3), of new grounds for delay in August 1998. *See Barnes II*, 66 Fed. Cl. at 499 n. 2.

unlawfully dismissed because his deemed non-selection was based on an improper removal of his name from the promotion list--remained to be considered. *Id.* at 499, 503. The court again agreed with Barnes that the Navy failed to follow its regulations in removing his name from the promotion list, rendering the first non-selection invalid. *Id.* at 503-05. The court incorporated by reference its analysis from the earlier decision and reasoned that, "[a]bsent a valid 'first' deemed non-selection, there was no 'second' failure of selection" to justify his involuntary discharge, as required under 10 U.S.C. § 632(a). *Id.* at 505.

Applying the constructive service doctrine, the trial court concluded that Barnes was entitled to back pay and benefits retroactive to when he was improperly separated in 2001. *Id.* at 505-06. In addition, with constructive credit, Barnes reached twenty years of active service and became eligible to retire in February 2006. The court expressly rejected the government's argument that Barnes had waived his right to reinstatement when he resigned from the Naval Reserves. *Id.* at 506-07. The Navy was ordered to reinstate Barnes with back pay. *Id.* at 508. Judgment was entered accordingly. No actions were taken by the Navy during the pendency of this appeal.

Timely notices of appeal and cross-appeal followed on December 2, 2005 and December 15, 2005, respectively. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

A

A decision granting or denying a motion for judgment upon the administrative record is reviewed without deference. We apply the same standard of review as the

United States Court of Federal Claims, which means "we will not disturb the decision of the corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005). The trial court's legal conclusions will not be reversed unless incorrect as a matter of law, and its factual findings will not be disturbed unless clearly erroneous. *Heisig v. United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983). Statutory or regulatory interpretation, however, is reviewed without deference. *Strickland v. United States*, 423 F.3d 1335, 1337 (Fed. Cir. 2005).

B

As a threshold matter, the government asserts that alleged procedural defects concerning the Navy's decision to remove Barnes' name from the promotion list are not subject to judicial review. This argument was specifically rejected below. *Barnes II*, 66 Fed. Cl. at 499-503. We agree with the trial court.

It is well-established that although the merits of military promotion decisions are nonjusticiable, "a challenge to the particular procedure followed in rendering a military decision may present a justiciable controversy." *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995). Indeed, *Dysart* itself recognized that courts can evaluate whether the military follows the procedures mandated by statute or by its own regulations when making promotion decisions. *See* 369 F.3d at 1315; *see also Lewis v. United States*, 458 F.3d 1372, 1377 (Fed. Cir. 2006) (observing that courts can review promotion decisions for violations of the Constitution, statutes, or regulations). As this is the precise nature of Barnes' challenge, it is properly before us.

C

On the merits, the government argues that the Navy complied with all relevant statutory and regulatory procedures. We agree that the court erred in finding otherwise.

Under the relevant statute and the accompanying Navy regulation, a promotion may be delayed if (A) sworn court-martial charges have been received and such charges have not been disposed of; (B) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer; (C) a board of officers has been convened to review the record of the officer; or (D) a criminal proceeding in a federal or state court is pending against the officer. 10 U.S.C. § 624(d)(1);[5] SECNAVINST 1420.1A ¶ 23a. A promotion may also be delayed if there is cause to believe that the officer is "mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. § 624(d)(2); *see also* SECNAVINST 1420.1A ¶ 23a. In any event, notice of the grounds for the delay must be given, "unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable," so the officer will have an opportunity to submit a written statement in response to the Secretary of the Navy. 10 U.S.C. § 624(d)(3); *see also* SECNAVINST 1420.1A ¶ 23c. Moreover, the delay may not last "for more than six months after the date on which the officer would otherwise have

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[5] This statutory provision was later amended on October 17, 2006, *see* P.L. 109-364, 120 Stat. 2181, 2183, to include another subparagraph: "(E) substantiated adverse information about the officer that is material to the decision to appoint the officer is under review by the Secretary of Defense or the Secretary concerned."

been appointed unless the Secretary concerned specifies a further period of delay," and even then, no more than 18 months after the officer would otherwise have been appointed. 10 U.S.C. § 624(d)(4); *see also* SECNAVINST 1420.1A ¶ 23d.

Here, the court agreed with Barnes that the delay in his promotion was not supported by any of the grounds listed in § 624(d) and ¶ 23a. Yet, the March 17, 1998 notice stated that the reason for the delay in Barnes' promotion was his conduct unbecoming an officer, for which he had received non-judicial punishment in a proceeding that was completed on November 24, 1997. It expressly referenced SECNAVINST 1420.1A and observed "you may not be qualified for permanent promotion." In other words, the proffered reason for the delay was the catch-all provision of § 624(d)(2). The memorandum clearly implies that Barnes' attempted fraternization with female subordinates was cause to believe he was not qualified to be promoted. The court therefore erred by interpreting this statement as merely "posing a question" and "not a finding of cause to believe Barnes was not mentally, physically, morally, or professionally qualified to perform the duties of the higher rank." *Barnes I*, 57 Fed. Cl. at 211. Further, the court improperly concluded that a separate order to show cause on fitness for promotion was required. The statute merely contemplates giving notice to the officer of the grounds for the delay; it does *not* suggest any requirement to provide an even earlier notice that one of the statutory grounds for delay may exist. Moreover, contrary to the ruling of the trial court, there is no requirement in the statute or the accompanying regulation for a formal "finding" on fitness before a promotion may be delayed.

The court further found that, even if the delay had been supported by one of the enumerated statutory reasons, it

ended by its own terms when "all related administrative or disciplinary action [wa]s completed," which the trial court found was on May 27, 1998. *Id.* at 213. This was also erroneous. While it is true that Barnes' separation proceedings before the BOI ended on May 27, 1998, the record clearly demonstrates that whether he was suitable for promotion to lieutenant commander was still pending review by his chain of command. Indeed, Barnes himself recognized this to be the case in his letter dated April 1, 1999, wherein he "respectfully request[s] that the Navy drops the effort to remove [him] from the promotion list, and restore his promotion effective 01 April 1998."

In the alternative, Barnes argues that the Navy failed to comply with the notice requirement by not notifying him of the March 17, 1998 letter before the effective date of his promotion, i.e., April 1, 1998. We disagree. The statute and accompanying regulation expressly provide an exception where notice is "impracticable"; here, Barnes was at sea. Moreover, Barnes did not suffer any prejudice, as he promptly submitted his written response as soon as he returned to Japan. Meanwhile, the Navy neither took action against him nor made any decision to do so. Thus, even if the court had correctly concluded that there was a procedural defect, we hold it was harmless.

With respect to the extension of the delay period beyond six months, we agree with the court that ratification was sought before six months had expired and the total period of delay before Barnes' name was removed was less than eighteen months, in compliance with statutory and regulatory requirements. The trial court, however, found that the failure to notify Barnes that the delay had been extended in August 1998 was a procedural defect, emphasizing that "the officer must know about the delay in order for the officer to respond." *Barnes I*, 57 Fed. Cl. at 217. Yet, neither §

624(d)(4) nor SECNAVINST 1420.1A ¶ 23d requires a separate notice to be provided if a delay in promotion is extended beyond six months. We are not persuaded by the argument that the notice requirement of § 624(d)(3) and ¶ 23c applies. The government correctly argues that an officer must be notified of the *grounds* for a delay, not its duration.[6] Here, the underlying reason for delay did not change. Barnes already knew that his promotion was being delayed due to his misconduct. He not only had the opportunity to respond but had actually submitted multiple written responses, dated April 25, 1998, September 24, 1998, and November 3, 1998, respectively.

We therefore conclude that there was no procedural error in the delay of Barnes' promotion. As such, we necessarily find that the later removal of his name from the promotion list occurred during a lawful delay period. Thus, the first non-selection was valid, and Barnes was properly discharged following his second non-selection.

In light of this holding, we need not reach the government's alternative argument that Barnes is precluded from seeking reinstatement after *Dysart* because allowing such a remedy for the alleged procedural errors would encroach upon the President's appointment authority. Nor do we need to decide whether Barnes waived his right to reinstatement when he voluntarily resigned from the Naval Reserves. We further decline to resolve whether the BCNR's denial of relief was otherwise improper, an issue that the trial court never decided in the first instance.

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[6] As such, we reject Barnes' argument that the August 1998 extension of the delay was procedurally defective for failing to specify the further period of delay.

D

Although he argues that it was wrongly decided, Barnes himself recognizes that this panel is bound to follow *Dysart* unless and until it is overturned by the court sitting en banc. We therefore do so and reject the cross-appeal. Nor are we persuaded, as requested, to propose en banc review ourselves.

III. CONCLUSION

For these reasons, the judgment of the Court of Federal Claims is

REVERSED.

APPENDIX B

United States Court of Federal Claims.

Danny T. BARNES, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 99-883C.

June 22, 2005.

Background: Former Navy officer brought suit against the United States, alleging that his involuntary discharge after being passed over for promotion was improper because his promotion to lieutenant commander occurred by operation of law.

Holding: The Court of Federal Claims, Merow, Senior Judge, held that Navy did not comply with its regulations when it removed officer's name from promotion list during period when there were no statutory or regulatory grounds for delay of promotion, and thus removal did not constitute a "nonselection" for promotion for purposes of statute mandating involuntary discharge after two nonselections for promotion.

Judgment for plaintiff.

Opinion, 57 Fed. Cl. 204, vacated.

Eugene R. Fidell, Washington, D.C., for plaintiff. Of counsel was Charlotte E. Cluverius, Washington, D.C.

Douglas K. Mickle, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Bryant G. Snee, Assistant Director. Of counsel was Capt. Thomas B. Merrit, Jr., United States Marine Corps, Department of the Navy, Office of the Judge Advocate General, General Litigation Division, Washington, D.C.

OPINION AND ORDER

MEROW, Senior Judge.

Lt. Barnes enlisted in the Navy on June 20, 1983, and began his Naval Reserve Officer Training on August 11, 1984. Administrative Record ("A.R.") I at 1, 40. He was promoted to ensign on May 13, 1988, to lieutenant junior grade on May 25, 1990, and to lieutenant on June 1, 1992. A.R. at 119-21. On April 30, 1997, Lt. Barnes was selected for promotion to lieutenant commander by the Fiscal Year 1998 Promotion Board. A.R. III at 2-6. The Secretary of the Navy forwarded the Promotion Board's report, including Lt. Barnes' name, to the Secretary of Defense for approval on August 29, 1997. A.R. III at 1. On September 30, 1997, the Secretary of Defense, on the President's behalf, approved the Promotion Board's selections. *Id.* On October 29, 1997, Lt. Barnes' nomination for promotion to lieutenant commander was submitted to the Senate, 143 Cong. Rec. S11390, S11391 (Oct. 29, 1997), and was subsequently confirmed. 143 Cong. Rec. S12214-03 (Nov. 8, 1997).

Lt. Barnes was not appointed to a lieutenant commander position, and on September 8, 1998, the Chief of Naval Personnel notified Lt. Barnes that the Secretary of the Navy was considering removing his name from the promotion list. A.R. IV at 10. On March 22, 1999, the Chief of Naval Personnel recommended that Lt. Barnes' name be removed from the promotion list. A.R. IV at 2. On April 26, 1999, that recommendation was approved by the Secretary of the Navy. *Id.* By statute, the removal of his name from the promotion list was deemed a nonselection for promotion; therefore, his subsequent failure to be selected for promotion in 2001 was considered his second nonselection which, also by statute, resulted in his involuntary discharge from the Navy on March 1, 2001. 10 U.S.C. §§ 629(c)(2), 632(a). Pl.'s Cross-Motion, App. at 4.[1] [FN1] ("Your second failure of selection at the Fiscal Year 2001 Active Duty Line Lieutenant Commander Selection Board dictates you be separated from active duty no later than 1 March 2001.")

The Board for Correction of Naval Records ("BCNR") twice considered plaintiff's requests for relief. On May 16, 2000, prior to his involuntary termination, Lt. Barnes submitted an Application for Correction of Naval Records. Supplemental Administrative Record ("S.A.R."), Tabs 1 & 2. The Application asserted that because the Navy failed to follow its procedures in delaying his promotion prior to the removal of his name from the promotion list, he was promoted as a matter of law under 10 U.S.C. § 624(a)(2) which provides that "[e]xcept as provided in subsection (d), officers on a promotion list for a competitive category *shall* be promoted to the next higher grade when additional officers in that grade and competitive category are needed."

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[1] Although not numbered, the August 8, 2000 letter to Barnes informing him he was involuntarily terminated from the Navy because his failure of selection by the Fiscal Year 2001 Selection Board was his "second failure," is the fourth page of the Appendix.

(emphasis supplied). While a delay of promotion extends the period prior to appointment, Lt. Barnes' promotion was delayed. He asserts the delay was in contravention of procedural regulations.

At plaintiff's request, on May 17, 2000, the court stayed this litigation pending the Board's decision. On January 11, 2001, the Board denied the Application. S.A.R., Tab 6. On November 26, 2001, the Assistant General Counsel (Manpower and Reserve Affairs) requested the Board reconsider. Second S.A.R. at 4. On December 4, 2001, the court continued its stay pending the Board's reconsideration. On December 19, 2001, the Board again denied relief, including Lt. Barnes' request for removal of any failure of selection to lieutenant commander from his record, and cancellation of his March 1, 2001 discharge from the Navy. *Id.* at 2-3.

Plaintiff asserts the removal of his name from the promotion list did not comport with statutory and regulatory constraints, therefore he was not twice nonselected for promotion by valid proceedings and his termination from the Navy was improper. He seeks reinstatement and backpay. Plaintiff also requested that his promotion be recognized as a matter of law. The court previously entered a liability determination on the administrative record, in Lt. Barnes' favor, finding he was promoted as a matter of law. *Barnes v. United States*, 57 Fed. Cl. 204 (2003). Thereafter, proceedings concerned the appropriate amount and nature of relief. Following the Federal Circuit's decision in *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), and ensuing supplemental briefing and oral argument, the court must revisit its decision in Barnes and now address plaintiff's alternative arguments.

Promotion as a matter of law

Pursuant to 10 U.S.C. § 624(a)(2), officers on a promotion list "shall be promoted to the next higher grade" upon vacancy, except under certain enumerated instances in which case appointment may be delayed. Following Presidential nomination and Senate confirmation, Lt. Barnes' promotion was delayed. Finding several procedural, regulatory and statutory infirmities with the delay, the court construed "shall be promoted" as a statutory mandate that caused plaintiff's promotion. 57 Fed. Cl. at 219. *See Law v. United States*, 11 F.3d 1061, 1065 (Fed. Cir. 1993) (noting that Law was not asking the court to order his promotion, but to recognize that it had occurred; that precedent holding the court had no authority to grant the promotion was inapplicable; and that the Court of Federal Claims had jurisdiction to grant the relief requested); *Voge v. United States*, 844 F.2d 776, 782 (Fed. Cir. 1988) ("[A]bsent a statute or regulation entitling a service member to a promotion as a matter of law, the Claims Court has no authority to entertain" a claim for promotion.).

Subsequently, *Dysart v. United States*, in which plaintiff appeared as one of four amici curiae, held that despite statutory promotion direction, "[t]he President's decision not to appoint is a discretionary act that cannot be reviewed by a court." 369 F.3d at 1317 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-67, 2 L. Ed. 60 (1803)). Article II, Section 2, Clause 2 of "the Constitution provides that the President has the authority to nominate and, 'by and with the Advice and Consent of the Senate,' to appoint 'Officers of the United States.'" "The President's decision here whether or not to exercise his appointment power is discretionary, and we hold that the President cannot be compelled to appoint military officers." 369 F.3d at 1306, 1317. Accordingly, Lt. Barnes reluctantly concedes the first three

causes of action of his First Amended and Supplemental Complaint[2] for promotion by operation of law, are due to be dismissed based on *Dysart*. The "promotion" conclusion previously reached in *Barnes*, 57 Fed. Cl. at 219, cannot stand. Lt. Barnes' claims contesting his dismissal from the Navy, as based on deemed nonselection caused by a procedurally deficient removal of his name from the promotion list, remain for resolution.

By statute, removal of Barnes' name from the promotion list, unless corrected, becomes a "failure of selection" when he was not selected for promotion by the next Selection Board, resulting in two "failed" selections and mandating his involuntarily termination.

If an officer whose name has been "removed" from the promotion list is not recommended for promotion by the next selection board, that officer "shall be considered for all purposes to have twice failed of **selection** for promotion." 10 U.S.C. § 629(c)(2) (emphasis supplied).[3] Because his

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[2] The First Cause of Action asserts he was promoted to lieutenant commander by operation of law when he was not notified of the delay of his promotion prior to its effective date, in violation of 10 U.S.C. § 624(d)(3) and SECNAVINST (Secretary of Navy Instructions) 1420.1A ¶ 23c. The Second Cause of Action asserts that the delay of his promotion expired on May 27, 1998, when all administrative and disciplinary actions related to his nonjudicial punishment were completed; accordingly, he was promoted as a matter of law on that date. The Third Cause of Action asserts that he was not provided notice of new grounds for delay of his promotion as required under 10 U.S.C. § 624(d)(3); accordingly, he was promoted as a matter of law.

[3] 10 U.S.C. § 629(c)(2) provides in relevant part:

> If such an officer who is in a grade below ... [Navy] captain is not recommended for promotion by the next selection board convened for his grade and competitive category, or if his name is again removed from the list of officers recommended for promotion, or if the Senate again does not give its advice and consent to his

name was removed from the promotion list, and he was not recommended for promotion by the next promotion board, the Navy proceeded on the basis that plaintiff was considered twice failed of selection. However, as a matter of fact, Lt. Barnes was selected for promotion by the 1998 Board, and the selection received Senate confirmation. Only if Lt. Barnes' name was then properly removed from the promotion list, can the subsequent promotion board's failure to select him for promotion be deemed a "second" nonselection. *Id.* It would turn the statute on its head if the solution Congress prescribed for undue delay, *i.e.* "promotion," cannot be implemented, as ruled in *Dysart*, but, instead, a procedurally defective name removal could still be utilized, not to promote, but to dismiss an officer.

While substantive discretionary determinations are incapable of review, Barnes' involuntary release may be reviewed for procedural compliance with Navy regulations.

The government argues the Navy's substantive decision to remove Lt. Barnes from the approved and confirmed promotion list, as well as any procedural deficiencies attendant that decision, are not justiciable.

There is a plethora of authority mandating judicial deference to military decisions. *North Dakota v. United States*, 495 U.S. 423, 443, 110 S. Ct. 1986, 109 L. Ed. 2d 420 (1990) ("When the Court is confronted with questions relating to ... military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle."); *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) ("[D]ecisions as to the composition, training, equipping, and control of a military force are

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promotion, he shall be considered for all purposes to have twice failed of selection for promotion.

essentially professional military judgments."); *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S. Ct. 534, 97 L. Ed. 842 (1953) ("[J]udges are not given the task of running the Army."); *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988) ("Judicial deference must be 'at its apogee' in matters pertaining to the military and national defense.").

[1] Specifically, the merits of promotion decisions are nonjusticiable. *Haselrig v. United States*, 333 F.3d 1354, 1355, 1357 n. 3 (Fed. Cir. 2003) (reviewing Air Force promotion board's procedures and concluding they "reflect a permissible construction of [the statute]," but noting that "the merits of such a decision [not to promote] are not subject to judicial review."); *Richey v. United States*, 322 F.3d 1317, 1328 (Fed. Cir. 2003) ("No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure."); *Fluellen v. United States*, 225 F.3d 1298, 1304 (Fed. Cir. 2000) (finding complaints about an Air Force Correction Board review of prospects for promotion to be nonjusticiable). Leadership issues are matters for the military, not the judiciary. As the Federal Circuit observed in *Porter v. United States*:

> The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and personnel files and qualifications of all the officers considered.

163 F.3d 1304, 1316-17 (Fed. Cir. 1998) (*quoting* Brenner v. United States, 202 Ct. Cl. 678, 692, 693-94, 1973 WL 21354 (1973)).

On the other hand, military decisions that do not comport with statutory, regulatory or procedural strictures, including those concerning promotions, are reviewable. "Though the question of fitness to serve may be nonjusticiable in various contexts, we have consistently noted that a challenge to a particular procedure followed by the military in rendering a decision may present a justiciable issue." *Fisher v. United States*, 402 F.3d 1167, 1177 (Fed. Cir. 2005). *See Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) (*citing Service v. Dulles*, 354 U.S. 363, 388, 77 S. Ct. 1152, 1 L. Ed. 2d 1403(1957)); *Carmichael v. United States*, 298 F.3d 1367, 1373-74 (Fed. Cir. 2002) and *Voge*, 844 F.2d at 779 ("'It has long been established that government officials must follow their own regulations, even if they were not compelled to have them at all.'"). *See also Dysart*, 369 F.3d at 1315 (stating that "[i]n general, the subject of military promotions is beyond the competence of courts to review," but "redress may be afforded for a promotion improperly denied"). "Not every claim arising from a military decision presents a nonjusticiable controversy." *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) ("[A]lthough the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy.") (emphasis in original). *Groves v. United States*, 47 F.3d 1140, 1144 (Fed. Cir. 1995) ("[N]o court is qualified to review the substantive merits of a decision [committed to the discretion of the military], so long as the decision comports with any procedural standards mandated by statute or regulation."); *Lindsay v. United States*, 295 F.3d 1252, 1257-58 (Fed. Cir. 2002) (reversing the dismissal of a service member's claim

that his involuntary separation was due to an evaluation that did not follow Air Force procedures, noting that "[a] claim of procedural violations may present a justiciable controversy because 'the test or standards against which this court measures the military's action are inherent: they are the applicable statutes and regulations'") (*quoting Adkins*, 68 F.3d at 1323). "A court may appropriately decide whether the military followed procedures because by their nature the procedures limit the military's discretion." *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993). "[O]nce the Secretary promulgated regulations and instructions and made them the basis [for the officer's involuntary release], his action became subject to judicial review for compliance with those regulations and instructions, even though he was not required to issue them at all." *Sargisson v. United States*, 913 F.2d 918, 921 (Fed. Cir. 1990). *See also Roth v. United States*, 378 F.3d 1371, 1385 (Fed. Cir. 2004); *Godwin v. United States*, 338 F.3d 1374, 1378 (Fed. Cir. 2003); *Kreis v. Sec'y of Air Force*, 406 F.3d 684, 686 (D.C.Cir.2005); *Rolader v. United States*, 42 Fed. Cl. 782 (1999).

The consequences of procedural violations may include setting aside an involuntary discharge and ordering reinstatement. In *Porter v. United States*, 163 F.3d 1304 (Fed. Cir. 1998), the officer complained about substantive evaluation data provided to the promotion selection board. The Federal Circuit sanctioned a remand to a Special Selection Board to determine whether the promotion decision would have been different with a corrected evaluation. Like Barnes, Porter sought to invalidate at least one of the passovers which led to his termination, a consequence recognized by the Federal Circuit. "[The voiding of previous passovers] would have removed the legal basis for Porter's 1985 discharge, resulting in a constructive if not actual reinstatement to his pre-discharge rank of first lieutenant and entitlement to back pay and

related benefits." 163 F.3d at 1305. Thus, procedural infirmities in the removal of Lt. Barnes from the promotion list could void his imputed nonselection and consequent involuntary release.

The court's threshold decision of justiciability is also guided by the Federal Circuit's recent analysis in *Wagner v. United States*, 365 F.3d 1358 (Fed. Cir. 2004). There, unlike many of the passover or termination cases which contested the merits of a military decision, the Federal Circuit found procedural error in the commencement of separation proceedings. Army Regulation ("AR") 600-8-24 required the Secretary of the Army approve the commencement of separation proceedings if the service member had eighteen or more years of service as of the date of the proposed release. When the proceedings began, Wagner had not reached that threshold, but with subsequent update of his records, he did. Separation proceedings continued however, without knowledge of this update and Wagner was subsequently involuntarily released. The Army then became aware that with his updated records, he had tenure. The Secretary then gave his retroactive approval. Wagner sought relief, including reinstatement, from the Army Board for Correction of Military Records. Relief was denied, the Board concluding that any error was harmless. In reversing, the Federal Circuit differentiated between cases where procedural defects are reviewed for harmless error and those where error is presumed. "Where reviewable standards or factors constrain the exercise of discretion, harmless error continues to be the appropriate test. Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred." 365 F.3d at 1365 (citations omitted). "[S]trict compliance with procedural requirements is not required where the error is deemed harmless." 365 F.3d at 1361, *citing Gratehouse v. United*

States, 206 Ct. Cl. 288, 512 F.2d 1104, 1108 (1975) ("Exceptions are made to the rule of *Service v. Dulles* where the procedural error is deemed harmless."); *Carmichael v. United States*, 298 F.3d 1367, 1375-76 (remanding for a determination whether the Navy would have discharged the soldier even if it had followed proper procedures); and *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990) (finding harmless error in a procedural violation where there was no risk of prejudice).

In sum, substantive errors are reviewable for harmless error, that is whether "'substantial evidence showed that it was unlikely that the officer would have been promoted in any event.'" 365 F.3d at 1362 (*citing Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804, 818 (1979)) and discussing *Engels v. United States*, 230 Ct. Cl. 465, 678 F.2d 173 (1982).[4]

In contrast to deficiencies in a service member's record, harmless error does not apply to "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards.... [They are] not quantifiable and [are] therefore incapable of review." 365 F.3d at 1364 (internal quotation marks omitted). Included in that category are "procedural errors regarding the composition of military selection boards." *Wagner*, 365 F.3d at 1362, *citing Doyle v. United States*, 220 Ct. Cl. 285, 599 F.2d 984 (1979) (review

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[4] *Wagner* noted that harmless error analysis required in *Sanders* was eliminated in *Porter v. United States*, 163 F.3d 1304, 1324 (Fed. Cir. 1998). *Wagner*, 365 F.3d at 1365 n. 2. Citing the 1980 enactment of the Defense Officer Personnel Management Act ("DOPMA") under which an officer not selected for promotion may appear before a Special Selection Board, Porter "dispense[d] with the old and mooted harmless error inquiry." *Porter*, 163 F.3d at 1325. Substantive record errors are remanded to a Special Selection Board for consideration without voiding prior passovers.

board did not contain statutorily required number of Reserve officers; review for harmless error did not apply; reinstatement and back pay ordered), *Evensen v. United States*, 228 Ct. Cl. 207, 654 F.2d 68, 72 (1981) (reinstatement and back pay ordered without harmless error review where, in violation of statutory proscription, review board included members who had served on a prior board that had not selected the plaintiff for promotion), and *Porter v. United States*, 163 F.3d at 1317. The *Wagner* court concluded that the "nature of the procedural error involved required our conclusion that harmless error review is inappropriate in this case, as the magnitude of the effect of the error on the proceeding defies assessment by a reviewing body." 365 F.3d at 1364.

The determination that the harmless error screen did not apply to the failure to get preapproval of separation proceedings in *Wagner* applies with equal force to Lt. Barnes' allegations of improper delays in his promotion, the subsequent removal of his name from the promotion list and consequent imputed nonselection and involuntary termination from the Navy.

The court's analytical construct here is also consistent with *Finkelstein v. United States*, 29 Fed. Cl. 611 (1993), where plaintiff was involuntarily separated from the United States Army following two promotion board passovers. The first promotion board was convened before Finkelstein had served a full year of continuous active duty, but less than one year since her placement on the active duty list. Therefore, her consideration for promotion was not within the temporal windows set by Army regulations. Also, both promotion boards were convened before she had completed the required three years of service in that grade. The validity of the discharge depended on the validity of the passovers.

> The principal issue addressed in this opinion is whether plaintiff's 'constructive service' meets the time in service requirements of [the AR and statute]. If it does not meet [those requirements], her first failure of selection was invalid. If it does not meet the actual service in grade requirement of [the statute], both passovers were invalid. In either event, whether based on two illegal passovers or only one, her discharge would be invalid.

29 Fed. Cl. at 616 (footnote omitted). The court concluded that the selection boards nonselected her for promotion before the required time in duty periods had elapsed; accordingly, the ABCMR's refusal to remove the unauthorized passovers and reinstate her in the Army was erroneous. Reinstatement was ordered. 29 Fed. Cl. at 625.

At oral argument in this case, the government asserted that the procedures at issue here were not "regulations" because they were not promulgated under the Administrative Procedures Act, with notice and opportunity for comment. While regulatory procedural restraints on the Navy's decisions may be subject to judicial scrutiny, the procedural glitches in the removal of plaintiff's name from the promotion list here, were embodied in a personnel regulation. Accordingly, the government argues, no substantive rights were created. *Hamlet v. United States*, 63 F.3d 1097 (Fed. Cir. 1995), cited by the government for this position, concluded that a personnel manual could confer enforceable rights pursuant to 28 U.S.C. § 1491(a), except that the provision there contravened a federal statute.[5] 63

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[5] The *Hamlet* panel recognized that "several courts have held that an agency manual or handbook can be a binding agency regulation." 63 F.3d at 1103-04 (*citing Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 538-40, 79 S. Ct.

F.3d at 1106. Here, the Navy regulation does not. And, recently, *Wagner* clearly rejected the government's proffered defense. "[F]undamental errors are not limited to statutory procedural error, but may also result from violations of regulations and even internal operating procedures." *Wagner*, 365 F.3d at 1363.[6] Indeed, it was noncompliance with a internal regulation that led to the Federal Circuit's conclusion Wagner "was not legally released from active duty due to the Army's failure to adhere to its involuntary separation procedures as set out in AR 600-8-24." 365 F.3d at 1365.

The Navy did not comply with its procedures when it removed Barnes' name from the promotion list; accordingly, the removal was not a "nonselection" for promotion.

In his Fourth Cause of Action of his First Amended and Supplemental Complaint, plaintiff asserts his "release from active duty in 2001 was unlawful because it was the result of the unlawful purported removal of his name from the active

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968, 3 L. Ed. 2d 1012 (1959); and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 274-76, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969)).

[6] Defendant's citation to *Abruzzo v. United States*, 206 Ct. Cl. 731, 513 F.2d 608 (1975), is also inapposite. In *Abruzzo*, the plaintiff alleged that the Marine Corps' failure to process a requested transfer to the Air Force voided his involuntary release from active duty after he was twice nonselected for promotion. Plaintiff argued that he had a right to remain on active duty until that request was properly processed. The Court of Claims adopted the conclusion of the trial court that any defects in the handling of his transfer request did not insulate him from release from active duty. "Plaintiff incorrectly equates his undoubted right to request an interservice transfer to an obligation by the Marine Corps to retain him on active duty until that request has been finally approved or disapproved. In fact, no such obligation exists. Plaintiff's tour of duty was not in any way related, or otherwise contingent on, the proper processing of the transfer request." 513 F.2d at 611.

duty lieutenant commander promotion list." While a presidential refusal to appoint is not reviewable under *Dysart*, and thus relief based upon an office not attained is precluded, deficient removal from the promotion list is a different matter. As plaintiff argues, "[t]he fact that that [sic] an officer whose promotion is derailed by a refusal to appoint cannot compel appointment does not ineluctably lead to the conclusion that the courts are powerless to examine the legality of the process leading up to that refusal-- here the purported removal from a promotion list." Pl.'s Supplemental Br. at 3. Because his name was not properly removed from the promotion list, the resulting lack of two valid promotion passovers is the basis for plaintiff's assertion that he is "deemed to have remained on active duty until such time as he retires or is otherwise lawfully removed from active duty." *Id.* at 3.

Officers on a promotion list "shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. § 624(a)(2). Appointment may be delayed under certain specified circumstances, but no more than eighteen months from the initial anticipated appointment date given.

> An appointment of an officer may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay. An officer's appointment may not be delayed more than 90 days after final action has been taken in any criminal case against such officer in a Federal or State court, more than 90 days after final action has been taken in any court-martial case against such officer, or more than 18 months after the date on which such officer would otherwise have been appointed, whichever is later.

10 U.S.C. § 624(d)(4).

The President has delegated his right to remove a service member from the promotion list to the Secretary of Defense.

> The President has the authority to "remove the name of any officer from a list of officers recommended for promotion." 10 U.S.C. § 629(a). He has delegated this authority to the Secretary of Defense, but only for grades below rear admiral (lower half) (in the Navy) and brigadier general (in the Army, Air Force, and Marine Corps). *See* Exec. Order No. 12,396, § 1(b).

Dysart, 369 F.3d at 1309 n. 5.

Under the Navy's regulations, a name may be removed from a promotion list by appropriate request to the Secretary of the Navy only during a delay of that promotion:

> **e. Removal from the Promotion List.** If during a delay of promotion, it is determined that removal from the promotion list is appropriate, removal action under paragraph 17a may be initiated. Although removal action is contemplated, requests for delay extensions as provided in paragraph 23d shall be submitted to SECNAV as necessary until the officer's name is removed from the promotion list.

SECNAVINST 1420.1A, ¶ 23e.

Those authorized to remove are set forth in Paragraph 17a:

> SECNAV may remove the name of any officer from a promotion list to any grade below 0-7. CHNAVPERS or CMC, as appropriate, may submit requests for such

> action to SECNAV. In the case of officers on a promotion list for the grades 0-7 and above, CHNAVPERS or CMC, as appropriate, shall provide a request for removal action to the President via SECDEF to SECNAV for signature.

Accordingly, removal from an approved promotion list must be during a period of delay. Promotion delays are subject to statutory and regulatory constraints. A promotion may be delayed if: (1) sworn court-martial charges have been received; (2) a disciplinary investigation is being conducted; (3) a board of officers has been convened; (4) state or federal criminal charges are pending; or (5) "[u]nder regulations prescribed by the Secretary concerned, the appointment of an officer under this section may also be delayed in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. § 624(d)(1) and 624(d)(2).

As delineated in *Barnes v. United States*, 57 Fed. Cl. 204 (2003), at the time Lt. Barnes' name was removed from the promotion list, there were no statutory or regulatory grounds for delay--(1) there were no outstanding court-martial charges; (2) there was no criminal investigation; (3) no board of officers had convened; and (4) there were no pending criminal charges. Also there had been no finding of cause to believe he was mentally, physically, morally, or professionally unqualified to perform the duties of a lieutenant commander under regulations adopted by the Navy. Even if any of the foregoing grounds could have supported the March 17, 1998 delay memorandum, it expired by its own terms--"until all related administrative or disciplinary action is completed." A.R. IV at 39. All administrative and disciplinary proceedings against Lt.

Barnes were completed on May 27, 1998. When Barnes was notified on September 8, 1998 that his name might be removed from the promotion list, and on April 26, 1999 when Secretary of the Navy Richard Danzig approved the Chief of Naval Personnel's recommendation to remove his name from the list, any delay period had expired.

Furthermore, there was no valid basis for an extension of the period of delay after March 17, 1998, and the extension sought did not accord with procedural strictures. *Barnes*, 57 Fed. Cl. at 215-17. Accordingly, his removal was not "during a delay" as required by Navy procedures. There being no proper delay, the removal of Barnes' name from the promotion list on April 26, 1999 did not comport with the Navy's self-imposed limitations. SECNAVINST 1420.1A, ¶ 23e.

Plaintiff was not appointed to a position at the higher rank, and, referencing SECNAVINST 1420.1A, his name was removed from the promotion list on April 26, 1999 by Richard Danzig, Secretary of the Navy. A.R. IV at 2. After his name was removed from the 1998 promotion list, the 2001 Selection Board failed to select plaintiff for promotion. The defective removal of plaintiff's name from the 1998 promotion list still resulted in the Navy taking action on the basis that it was deemed a failure of selection, so that his 2001 failure of selection became his second. 10 U.S.C. § 629(c)(2).[7] A second failure of selection caused plaintiff's separation from active duty. 10 U.S.C. § 632(a).

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[7] 10 U.S.C. § 629(c)(2) provides:

> If such an officer (who is removed from a promotion list) who is in a grade below the grade of colonel or, in the case of the Navy, captain is not recommended for promotion by the next selection board convened for his grade and competitive category, or if his name is again removed from the list of officers recommended for promotion, or if the Senate again does not give its advice and

Like the procedural failure to get preapproval in *Wagner*, here action to remove Lt. Barnes' name from the list of those selected for promotion was not taken during an appropriate period of delay. In Lt. Barnes' situation, there is nothing to re-review. "The nature of the procedural error involved requires our conclusion that harmless error review is inappropriate in this case, as the magnitude of the effect of the error on the proceeding defies assessment by a reviewing body." *Wagner*, 365 F.3d at 1364. The bell has already been wrung. As set forth in the prior opinion in this matter, 57 Fed. Cl. 204, the Navy did not follow its procedures. Procedural defects in extending the delay that must exist to permit the removal of Lt. Barnes from the promotion list, like the procedural defects in Wagner, were systemic to Barnes' involuntary release.

The government argues any error was harmless. Plaintiff was afforded the right to comment on the removal of his name from the promotion list, the government notes, thus removing possible harm. Again, *Wagner*'s discussion of when harmless error is inapplicable mandates rejection of this analysis. Moreover, prejudicial consequence is self-evident. The procedurally deficient name removal resulted in Lt. Barnes' involuntary termination from the Navy.

Failure to comply with Navy regulations concerning name removal from promotion lists served to deprive the removal of its validity, and thus prevents the removal from serving as a **failure** of selection, when in fact, Lt. Barnes had actually been **selected** for promotion.[8] Absent a valid "first" deemed

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consent to his promotion, he shall be considered for all purposes to have twice failed of selection for promotion.

[8] This result is consistent with the intent of Congress. The statutory remedy Congress provided in this situation is automatic promotion/appointment to a position at the higher rank, not the

nonselection, there was no "second" failure of selection and the requirements of 10 U.S.C. § 632(a) have not been satisfied.

The constructive service doctrine applies.

The Military Pay Act is money-mandating. *Smith v. Sec'y of Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004) (*citing Dysart*, 369 F.3d at 1315). Under the Military Pay Act, "a member of a uniformed service who is on active duty" is "entitled to the basic pay of the pay grade to which assigned." 37 U.S.C. § 204(a).

An officer's right to pay "continues until the officer is properly separated from the service." *Smith*, 384 F.3d at 1295 (*citing Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804, 810 (1979)). *See also Van Cleave v. United States*, 402 F.3d 1341, 1343 (Fed. Cir. 2005); *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (*en banc*) ("[B]ecause of the unlawful discharge, the plaintiff is entitled to money in the form of the pay that the plaintiff would have received but for the unlawful discharge."); *Tippett v. United States*, 185 F.3d 1250, 1255 (1999) (If a service member's "discharge was involuntary and improper, his statutory right to pay was not extinguished and thus serves as a basis for Tucker Act jurisdiction."); *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) ("It is well established that 37 U.S.C. § 204 serves as the money-mandating statute applicable to military personnel claiming damages and

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conversion of an actual selection into a deemed passover. 10 U.S.C. § 624(a)(2). For constitutional reasons, the intended statutory remedy is thwarted. *Dysart*, 369 F.3d at 1317 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-67 (1803)). However, to sanction the consequence the government seeks here of a procedurally defective name removal converting an actual promotion selection and confirmation into a deemed passover, would be antithetical to the intent of Congress.

ancillary relief for wrongful discharge."). Constructive service, a predicate for back pay, applies if a discharge or separation is voided. *Adkins v. United States*, 68 F.3d 1317, 1326-27 (Fed. Cir. 1995). Members of the military " 'who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation .... They are, therefore, entitled to back pay and benefits for the intervening period, *i.e.*, retroactive to their original separation from service.' " *Anderson v. United States*, 59 Fed. Cl. 451, 457-58 (2004) (*quoting Christian v. United States*, 337 F.3d 1338, 1347 (Fed. Cir. 2003)). Accordingly, Barnes is entitled to reinstatement and backpay.

The procedural infirmities in the delay of Lt. Barnes' promotion, which resulted in his deemed nonselection and consequent involuntary discharge, fit neatly within the circumstances described in *Smith v. Secretary of the Army*.

> [A]n action for money arises under the Military Pay Act when the decision not to promote the service member leads to the service member's compelled discharge. If, in such a case, the effect of an order voiding the nonpromotion decision would be to give the service member a right to continue in the service at his previous rank, he would have a claim for the pay lost because of his improper separation. In that instance, the Military Pay Act would give the service member a right to back pay, because the Act 'confers on an officer the right to pay of the rank he was appointed to up until he is properly separated from the service.'

384 F.3d at 1295 (citations omitted). The procedural infirmities in the delay of Barnes' otherwise valid selection

for promotion, prefatory to his compelled discharge, have the same result.

Lt. Barnes did not waive or relinquish his request for reinstatement.

Post-*Dysart* oral argument injected two new elements into this litigation. First, Lt. Barnes stated that he was ready, willing, and able to return to active duty, thus resolving a previous question in this regard.[9] Secondly, the government argued that Barnes recently resigned his commission, and accordingly, his appointment was lost. His resignation was for all purposes and waived the claims he seeks to assert here.

Following his involuntary termination, Lt. Barnes accepted a commission in the Independent Ready Reserves ("IRR") and received approximately $72,000 in separation pay. Def.App. filed January 7, 2005 at B4. Shortly after June 30, 2003, the date of the decision in his favor in *Barnes v. United States*, (and apparently in response to a request from the IRR for updated information for mobilization purposes), on July 15, 2003, plaintiff wrote to the Naval Reserve Personnel Center: "[p]lease accept this as my resignation

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[9] MR. FIDELL: Mr. Barnes is ready, willing and able to be restored to active duty at such time as the Navy issues him orders.... He's ready, willing and able. If they issue him a set of orders as a lieutenant, here we are. Or a lieutenant commander.

Hearing Tr. 12-13.

Previously, plaintiff's willingness to return to active duty was questionable. *See* Order of September 12, 2003. His previously stated position concerning restoration to office may have effectively mooted possible relief. However, if not correctly removed from active duty, Lt. Barnes may not be able to avoid reinstatement absent a resignation accepted by the Navy as of an agreed date. *Anderson v. United States*, 59 Fed. Cl. 451, 454 n. 7, 457-58 (2004).

from the IRR, thus ending my obligation to the U.S. Navy." Defendant's Motion Seeking Leave to Supplement the Record, Attach. B8. Accepting his resignation, the Navy's July 29, 2003 response referred to his discharge from the U.S. Naval Reserve. *Id.* at B9. By its terms, the resignation was only from the Reserves, the only military component of which he was an officer. Lt. Barnes' resignation from the Reserves did not waive the claims he seeks to assert here. *Van Cleave v. United States*, 402 F.3d 1341 (Fed. Cir. 2005).

The cases cited by defendant in this regard are distinguishable. In *Mimmack v. United States*, 97 U.S. 426, 14 Ct. Cl. 578, 24 L. Ed. 1067 (1878) and *Miller v. United States*, 19 Ct. Cl. 338 (1884), the President's attempts to rescind acceptance of officers' voluntary resignations were rebuffed. Lt. Barnes did not resign from active duty. *Parrish v. Brownlee*, 335 F. Supp. 2d 661 (E.D.N.C.2004) a recent stop loss case, also does not translate to this situation. In *Parrish*, the court found "[u]nder statutes and regulations governing the status of commissioned officers, plaintiff, as an officer in the IRR who did not resign his commission upon completion of his MSO [Military Service Obligation], remained under the jurisdiction of the Army and subject to call to active duty." 335 F. Supp. 2d at 669. The ability of the Navy to recall Lt. Barnes is not an issue in this case.

Appropriate relief

For the purposes of the remedy, the situation involved in this case is not akin to those involved in *Roth v. United States*, 378 F.3d 1371 (Fed. Cir. 2004), *Richey v. United States*, 322 F.3d 1317 (Fed. Cir. 2003), and *Porter v. United States*, 163 F.3d 1304 (Fed. Cir. 1998). In those cases, pursuant to 10 U.S.C. § 628, prior to its amendment in 2001, 107 Pub. L. No. 107, § 503(b), 115 Stat. 1012, 1084 (2001),

asserted defects in promotion selection board actions were held to require reconsideration by Special Selection Boards ("SSB"), as opposed to a court order voiding the selection board actions and reinstating the officers. In each of these cases the officers had twice been passed over for promotion, were discharged as a result, and then filed suit raising asserted defects in the selection board proceedings involved.

In the instant case, the defect involved does not concern the initial Selection Board action. There is no dispute that the Board selected Lt. Barnes for promotion to lieutenant commander. This selection was approved by the Secretary of Defense, the nomination was forwarded to the Senate and there confirmed. As detailed previously, in violation of Navy regulation, Lt. Barnes' name was then removed from the promotion list. There exists no basis upon which an SSB could reconsider the previous selection board action when no defect in the Board's action is involved. The defect in Lt. Barnes' case resides elsewhere. Absent the relevance of the pre-2001 procedure prescribed by 10 U.S.C. § 628, and absent the presence of harmless error, as discussed previously, reinstatement is required. This is because the invalid removal of Lt. Barnes' name from the promotion list precluded 10 U.S.C. § 629(c)(2) from operating to convert his initial selection for promotion to lieutenant commander, as confirmed by the Senate, into a passover. Lt. Barnes was thus improperly discharged from the Navy on March 1, 2001 on the basis of only one nonselection instead of the two nonselections required. 10 U.S.C. § 632(a). In this circumstance, Lt. Barnes has not been effectively discharged and is entitled to reinstatement and back-pay in his current rank.[10]

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[10] Final judgment in this matter will provide that following Lt. Barnes' reinstatement, the Secretary shall convene an SSB, pursuant to 10 U.S.C. § 628, to reconsider Lt. Barnes' 2001 failure of selection. This step will be required in that the 2001 Selection Board had before it Lt. Barnes'

The Military Pay Act, 37 U.S.C. § 204 entitles Barnes to "money in the form of the pay that the plaintiff would have received but for the unlawful discharge." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (*en banc*). *See also Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (holding the Military Pay Act "serves as the money-mandating statute applicable to military personnel claiming damages *and ancillary relief* for wrongful discharge") (emphasis supplied). Also, this court "may, as an incident of and collateral to any . . . judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, *and correction of applicable records*, and such orders may be issued to any appropriate official of the United States." 28 U.S.C. § 1491(a)(2) (emphasis added).

CONCLUSION

Based upon the foregoing, it is **ORDERED**:

(1) That the conclusion that Lt. Barnes was promoted set forth in the Opinion, reported at 57 Fed. Cl. 204 (2003), shall be **VACATED**;

(2) Plaintiff's discharge from the Navy on March 1, 2001 is invalid such that Lt. Barnes shall be reinstated in the Navy at his current rank with a judgment to be entered for appropriate back pay less the adjustments required, such as his civilian earnings for the period involved;

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record showing his previous name removal from the earlier promotion list, which record correction action to be ordered as part of the final judgment in this matter will eliminate.

(3) Final judgment, when entered in this matter, shall also provide for appropriate correction of Lt. Barnes' record to eliminate references to the removal of his name from the 1998 promotion list in connection with appropriate reconsideration of his promotion by an SSB for 2001; and

(4) Counsel shall now confer to reach agreement on the appropriate amount of back pay and adjustments for the entry of a final judgment in this matter, and on or before September 6, 2005, shall file a report in this regard setting forth the agreed amount(s), or, in the absence of an agreed amount(s), suggestions as to the further procedures required in order to determine the amount(s) involved.

APPENDIX C

United States Court of Federal Claims.

Danny T. BARNES, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 99-883C.

June 30, 2003.

Navy lieutenant whose name was removed from promotion list for lieutenant commander brought suit against the United States alleging his promotion to lieutenant commander occurred by operation of law because of improper delay. On cross-motions for judgment on the administrative record, the Court of Federal Claims, Merow, Senior Judge, held that plaintiff was promoted by operation of law when period of delay specified in delay memorandum expired according to its terms.

Plaintiff's motion granted; defendant's motion denied.

Eugene R. Fidell, Washington, D.C. for the plaintiff.

Joseph Trautwein, Department of Justice, Washington, D.C., with whom was Acting Assistant Attorney General David W. Ogden; David Cohen, Director; and Bryant Snee, Assistant Director; with whom was LCDR Jillian L.

Morrison, United States Navy Office of the Judge Advocate General, Washington, D.C.

OPINION

MEROW, Senior Judge.

Plaintiff, Navy Lieutenant Barnes, was nominated by the President of the United States and confirmed by the Senate for promotion to lieutenant commander. His promotion was delayed and later his name was removed from the promotion list. He alleges that the delay and removal of his name from the promotion list was not in accordance with statutory and regulatory procedure and, as a result, he is statutorily entitled to monetary consequences attendant that promotion. The government opposes. Both parties filed a motion for judgment on the administrative record pursuant to Rule 56.1 of the Rules of the Court of Federal Claims. These motions are now before the court.

Summary:

Lt. Barnes' nomination for promotion to lieutenant commander in the United States Navy was submitted to the Senate by then President Bill Clinton on October 29, 1997, and confirmed by the Senate on November 8, 1997. 143 Cong. Rec. S11390, S11391 (daily ed. Oct. 29, 1997), 143 Cong. Rec. S12214- 03 (daily ed. Nov. 8, 1997). The projected effective date of his promotion was April 1, 1998. By memorandum dated March 17, 1998, Lt. Barnes was informed that his promotion was delayed pending completion of administrative and disciplinary action related to nonjudicial punishment he received for conduct unbecoming an officer. Lt. Barnes did not receive this notice until April 21, 1998. Ratification by the Secretary of the Navy and an additional delay was requested on August 14,

1998, and approved on August 24, 1998. On April 26, 1999, Lt. Barnes' name was removed from the promotion list. Lt. Barnes alleges the delay and the removal of his name from the promotion list did not comply with statutory and regulatory provisions and the conditions placed on the delay by the Navy. He also contends the subsequent decision of the Navy Board for Correction of Military Records not to grant him relief was arbitrary and capricious.

Statutory and regulatory framework for military promotions

Evaluation and recommendation of eligible officers for promotion is made by a selection board of commissioned officers. 10 U.S.C. §§ 611-17, 622-23. The board's promotion list is forwarded through the Secretary of the Navy for recommendation, to the Secretary of Defense for approval, and then to the President of the United States. 10 U.S.C. §§ 618(b), 624(a)(1) and (c). The President, with the advice and consent of the Senate, has the authority to promote.

> [The President] shall have Power, by and with the Advice and Consent of the Senate... [to] nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.

United States Constitution, art. II, § 2, cl. 2.

Statutory provision is similar. 10 U.S.C. § 624(c) provides:

> Appointments under this section shall be made by the President, by and with the advice and consent of the

> Senate, except that appointments under this section in the grade of first lieutenant or captain or lieutenant (junior grade) or lieutenant shall be made by the President alone.

Following Presidential approval of the selection board's report, the names of all officers approved for promotion are listed in order of seniority. When additional officers in that grade and competitive category are needed, the most senior name is chosen and the promotion (or appointment) occurs. 10 U.S.C. § 624(a)(1). The promotion is effective on the date of appointment. Secretary of the Navy Instruction ("SECNAVINST") 1420.1A ¶ 22; Def.App. p. 10.

A. Statutory promotion

Officers "shall" be promoted in list order except as provided in 10 U.S.C. § 624(d) which provides for delays under limited circumstances:

> Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed. Promotions shall be made in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

10 U.S.C. § 624(a)(2)(emphasis added).

B. Promotion delay

The promotion "shall" occur unless: (1) there are court-martial charges pending against the officer; (2) an investigation is being conducted to determine if any

disciplinary action should be taken against the officer; (3) a Board of Inquiry has been convened to review the officer's records; or (4) state or federal criminal charges are pending against the officer. The officer "shall" be promoted in list order upon favorable conclusion of any of these proceedings[1] unless there is cause to believe that the officer is unqualified for the promotion under subsection (d)(2), the fifth and last statutory basis for delay. 10 U.S.C. § 624(a)(2) provides:

> Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if--
> (A) sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of;

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[1] Subsection (d)(1) is clear that upon favorable conclusion of any of these proceedings, the officer's promotion "shall" occur, retroactively if necessary:

> If no disciplinary action is taken against the officer, if the charges against the officer are withdrawn or dismissed, if the officer is not ordered removed from active duty by the Secretary concerned under chapter 60 of this title, or if the officer is acquitted of the charges brought against him, as the case may be, then unless action to delay an appointment has also been taken under subsection (d)(2) the officer shall be retained on the promotion list and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

> (B) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;
> (C) a board of officers has been convened under chapter 60 of this title to review the record of the officer; or
> (D) a criminal proceeding in a Federal or State court is pending against the officer.

The fifth grounds, 10 U.S.C. § 624(d)(2), provides for delay if there is cause to believe that the officer is unqualified for the promotion. If the officer is later found to be qualified, the promotion "shall" occur, again retroactively if necessary.

> Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may also be delayed in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion. If the Secretary concerned later determines that the officer is qualified for promotion to such grade, the officer shall, upon such promotion, have the same date of rank, the same effective date for pay and allowances in the higher grade to which appointed, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

SECNAVINST 1420.1A, ¶ 23, which echoes the statutory requirements, contains the Navy's policies and procedures governing promotion delays. Notably a delay in appointment must be ratified by the Secretary of the Navy "as soon as practicable."

> **a. Criteria for Promotion Delay.**
> CHNAVPERS [2] or CMC [3], as appropriate, or a member's commanding officer, may delay the appointment of an officer selected for promotion. If the appointment is delayed, the delaying officer shall, as soon as practicable, forward the information required by paragraph 23b to SECNAV [4] for ratification. Promotion may be delayed under this instruction if:
>
> (1) Sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of.
> (2) An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer.
> (3) Processing for separation for cause has been initiated under reference (h).[5]
> (4) A criminal proceeding in a Federal or state court is pending against the officer.
> (5) There is cause to believe that the officer is mentally, physically, morally, or professionally unqualified.

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2 Chief of Naval Personnel.

3 Commandant of the Marine Corps.

4 Secretary of the Navy.

5 SECNAVINST 1920.6A.

b. Command Requests for Delay.

(1) Commanding officers who consider delay of an officer's promotion warranted and delay an officer's promotion, shall submit justification for the delay to SECNAV via, CHNAVPERS (MNPC-82) (copy to COMNAVMILPERSCOM [6] (NMPC-22)), or CMC (MMPR-1) as appropriate, within 10 days of knowledge of the circumstances warranting the delay, or as soon thereafter as practicable.

(2) Each justification for delay to SECNAV must include the following documents:

(a) A copy of the notification to the officer and;

(b) A statement by the officer. If the officer declines to make a statement, the officer concerned shall submit a signed statement to that effect;

(c) Supporting rationale for delay from the officer's commanding officer based on his or her knowledge of the officer involved; and

(d) A recommendation by CHNAVPERS or DC/S (M & RA),[7] as appropriate.

10 U.S.C. § 624(d)(3) sets additional conditions and limits on promotion delays. Notice must be given to the officer before the effective date of the promotion unless it is "impractical" to do so, in which instance notice must be given as soon as practical:

> (3) The appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such

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[6] Commander, Naval Military Personnel Command.

[7] Deputy Chief of Staff (Manpower and Reserve Affairs).

> written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary.

Delay may not be longer than six months unless the Secretary specifies a further period of delay. In no instance may delay be more than eighteen months from the original effective date of promotion--here April 1, 1998. 10 U.S.C. § 624(d)(4):

> An appointment of an officer may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay. An officer's appointment may not be delayed more than 90 days after final action has been taken in any criminal case against such officer in a Federal or State court, more than 90 days after final action has been taken in any court-martial case against such officer, or more than 18 months after the date on which such officer would otherwise have been appointed, whichever is later.

C. Removal from the promotion list

The President may remove an officer's name from the promotion list. 10 U.S.C. § 629(a):

> (a) The President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter.

Under Navy regulations, an officer may be removed from a promotion list only during a period of delay:

> **e. Removal from the Promotion List.** If during a delay of promotion, it is determined that removal from the promotion list is appropriate, removal action under paragraph 17a[8] may be initiated. Although removal action is contemplated, requests for delay extensions as provided in paragraph 23d shall be submitted to SECNAV as necessary until the officer's name is removed from the promotion list.

SECNAVINST 1420.1A, ¶ 23e.

Factual summary

Nonjudicial punishment proceedings against Lt. Barnes were held at Misawa, Japan on November 24, 1997. Lt. Barnes was found guilty of five specifications of the Uniform Code of Military Justice and seven days of restriction were imposed. A.R. II, pp. 19-20. The charges concerned attempts to arrange off-duty liaisons with enlisted women, two of whom were his subordinates. A.R. II, p. 16-17. He did not file an appeal. On December 12, 1997, his commanding officer reported his nonjudicial punishment and recommended that while he should remain on the promotion list, Lt. Barnes should be the last on the list to be promoted, but he should not be required to show cause why he should be retained in the Navy. A.R. II, p. 15.

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[8] Paragraph 17a provides: a. SECNAV may remove the name of any officer from a promotion list to any grade below 0-7. CHNAVPERS or CMC, as appropriate, may submit requests for such action to SECNAV. In the case of officers on a promotion list for the grades 0-7 and above, CHNAVPERS or CMC, as appropriate, shall provide a request for removal action to the President via SECDEF to SECNAV for signature.

A March 17, 1998 memorandum to Lt. Barnes stated his promotion was delayed. The memorandum cited his nonjudicial punishment and stated that he may not be qualified for promotion. The delay was until "all related administrative or disciplinary action is completed." A.R. II, p. 39. Lt. Barnes did not receive this memorandum until April 21, 1998. Starting on April 1, 1998, his projected promotion date, he received pay at the higher rank for a year.

On March 19, 1998, a Show Cause Authority determined that Lt. Barnes should show cause why he should allowed to remain in the Navy. Citing the prior imposition of non-judicial punishment, the Board of Inquiry on May 27, 1998 determined he had engaged in conduct unbecoming an officer, failed to demonstrate acceptable qualities of leadership, and failed to conform to prescribed standards of military deportment. By a vote of 2 to 1, the Board recommended that Lt. Barnes be permitted to remain in the Navy. A.R. V, pp. 1-51.

By an August 14, 1998 request, approved on August 24, 1998, the March 17, 1998 delay of Lt. Barnes' promotion was ratified and extended by the Assistant Secretary of the Navy. A.R. IV, p. 12. On April 26, 1999, his name was removed from the promotion list. A.R. IV, p. 2. On March 1, 2001, he was released from active duty after twice being passed-over for promotion.

On May 16, 2000, Lt. Barnes submitted an Application for Correction of Naval Records which asserted in part that his promotion occurred as a matter of law because of improper delay. S.A.R., Tabs 1 & 2. On January 11, 2001, the Board for Correction of Navy Records determined Lt. Barnes had not been promoted as a matter of law. S.A.R., Tab 6. On December 19, 2001, upon consideration of equitable factors,

the Board again rejected his application. 2nd S.A.R., pp. 2-3.

Legal principles

As "decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S. Ct. 2440, 2446, 37 L. Ed. 2d 407 (1973), the substance of decisions such as whether or not a particular officer should be promoted, "is frequently beyond the institutional competence of courts to review." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002), *citing Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988). In *Voge* the court stressed that "[j]udicial deference must be 'at its apogee' in matters pertaining to the military and national defense." 844 F.2d at 779, *citing Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S. Ct. 2646, 2654-55, 69 L. Ed. 2d 478 (1981). See also *Adkins v. United States*, 68 F.3d 1317, 1322 (Fed. Cir. 1995) ("the merits of a service secretary's decision regarding military affairs are unquestionably beyond the competence of the judiciary to review.").

As the Federal Circuit recently observed, courts are reluctant to intervene in the merits of promotion decisions because of:

> the court's incurable lack of knowledge of the total grist which the boards sift, [and] also ... a preference not to meddle with the internal workings of the military. The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to

> resolve and pass upon the highly complicated questions and problems involved in the promotion procedure.

Richey v. United States, 322 F.3d 1317, 1327 (Fed. Cir. 2003), *citing Porter v. United States*, 163 F.3d 1304, 1316-17 (Fed. Cir. 1998).

However, "although the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy." *Adkins*, 68 F.3d at 1323 (emphasis in original). "A court may appropriately decide whether the military followed procedures because by their nature the procedures limit the military's discretion." *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993).

In *Adkins v. United States*, 68 F.3d 1317 (Fed. Cir. 1995), the officer challenged the decision of the Secretary of the Army rejecting the recommendation of the Army Board for Correction of Military Records that certain material be removed from the officer's personnel files. The officer claimed the Secretary improperly considered matters outside the administrative record to which he was denied access and the right to refute in violation of regulations which "assured [the service member] access to all official records that are necessary to an adequate presentation of his/her case." Adkins at 1325. The Federal Circuit held that Adkins stated a justiciable claim because military decisions are subject to judicial review for compliance with statutes and regulations.

> In cases in which procedural violations are alleged, the test or standards against which this court measures the military's conduct are inherent: they are the applicable statutes and regulations. In such instances, this court does not improperly exercise any discretion reserved

> for the military; 'it merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard.'

Adkins at 1323, *citing Murphy v. United States*, *supra* at 873.

The question is whether there are procedural "tests and standards which [courts] can soundly administer within their special field of competence." *Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988). " 'Adjudication of plaintiff's claims requires the district court to determine only whether the Secretary's decision making process was deficient, not whether his decision was correct.'" *Adkins*, 68 F.3d at 1323, *citing Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1011 n. 16 (8th Cir.1989). The military is bound by statutes as well as its own regulations. As the Federal Circuit recently articulated:

> The military no less than any other organ of the government is bound by statute, and even when granted unfettered discretion by Congress the military must abide by its own procedural regulations should it choose to promulgate them. *See Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993). A claim of procedural violations may present a justiciable controversy because 'the test or standards against which this court measures the military's actions are inherent; they are the applicable statutes and regulations,' *Adkins*, 68 F.3d at 1323.

Lindsay v. United States, 295 F.3d 1252, 1257-58 (Fed. Cir. 2002).

Accordingly, the court will apply statutes and regulations to the administrative record. Failure to adhere to those standards is remedied by monetary relief. "If the Court of

Federal Claims finds that the Army improperly exercised its authority to retire Adkins, he will be entitled to back pay calculated in accordance with law and reinstatement to the rank of lieutenant colonel from the date of his retirement." Adkins, 68 F.3d at 1327.

While both sides rely on numerous cases, *Rolader v. United States*, 42 Fed. Cl. 782 (1999) is the closest to the case sub judice, at least according to plaintiff. In *Rolader*, the court concluded the Air Force did not follow its procedures in initiating the removal of plaintiff's name from the promotion list. Accordingly, because the officer was not removed from the promotion list on the date his promotion delay expired, the court held that Lt. Col. Rolader was promoted by operation of law:

> There being insufficient proof that the Air Force complied with its own regulations in initiating a recommendation of removal, we hold that the delay to plaintiff's promotion expired on June 30, 1993. Because plaintiff's name was not removed from the promotions list before that date, **he was promoted by operation of law**.

42 Fed. Cl. at 787 (emphasis supplied).[9] *See also Voge v. United States*, 844 F.2d 776, 782 (Fed. Cir. 1988) ("absent a statute or regulation entitling a service member to promotion as a matter of law, the Claims Court [now the Court of Claims] has no authority to entertain this claim [for promotion as a matter of law].").

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[9] Rolader's motion for summary judgment was granted. Following a stipulation, judgment was entered that promoted plaintiff, corrected his military records, awarded him back pay and allowances, and declared that he would receive retired pay commensurate with the grade of colonel beginning March 1, 1999.

Summary of procedural errors alleged

Lt. Barnes alleges there was no statutory basis for the March 17, 1998 delay memorandum and that, alternatively, the period of delay specified therein (until the completion of all related administrative and disciplinary proceedings) expired. He also argues he was not given notification of a delay in his promotion prior to April 1, 1998, the effective date of his promotion. Procedural errors are also alleged in the August 24, 1998 extension of the initial promotion delay and in the removal of his name from the promotion list which he asserts was after the expiration of the delay.

Validity and expiration of term of promotion delay

Lt. Barnes' promotion was confirmed by the Senate on November 8, 1997, with a projected effective date of April 1, 1998. A memorandum to Lt. Barnes from the Chief of Naval Personnel dated March 17, 1998 (15 days prior to the date on which Lt. Barnes was projected to be promoted) cited his non-judicial punishment for conduct unbecoming an officer, and informed him that his April 1, 1998 promotion to lieutenant commander was delayed "until all related administrative or disciplinary action is completed." A.R. IV, p. 39. The memorandum also stated he may not be qualified for promotion.

> Subj: DELAY OF YOUR PERMANENT PROMOTION TO LIEUTENANT COMMANDER
> Ref: (a) CO NSGA Misawa ltr 1611 Ser NOO/01647 of 19 Dec 97 w/ends
> (b) SECNAVINST 1420.1A
> 1. Reference (a) reported you received nonjudicial punishment on 24 November 1997 for violation of UCMJ, Article 133, conduct unbecoming an officer.

> Per reference (b), you may not be qualified for permanent promotion.
> 2. Accordingly, you are hereby notified the Chief of Naval Personnel has approved the delay of your 1 April 98 permanent promotion to lieutenant commander until all related administrative or disciplinary action is completed.
> 3. You are hereby afforded the opportunity to submit a statement concerning this action prior to ratification by the Secretary of the Navy. Please forward your statement, or written declination to make a statement, via your chain of command, to the Chief of Naval Personnel (PERS 834/82) within fifteen days of receipt of this letter.

The memorandum's header refers to a December 19, 1997 memo from Lt. Barnes' Commanding Officer in Misawa, Japan reporting his November 24, 1997 nonjudicial punishment. In that report his commanding officer recommended Lt. Barnes' promotion not be withheld and that he not be required to show cause for his retention in the Navy.[10] The nonjudicial proceeding was completed on November 24, 1997, prior to the March 17, 1998 memorandum. Accordingly, as of March 17, 1998, there

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[10] The Commanding Officer wrote:

> LT Barnes is on the current selection list for promotion to Lieutenant Commander and is expected to be promoted in approximately June 1998. However, the conduct that resulted in this mast is not the conduct expected of a Lieutenant Commander. Accordingly, per reference (a), I most strongly recommend that his promotion be delayed such that he will be the last to be promoted in his year group. I believe that LT Barnes has the potential to be a strong, positive asset for the Navy. Therefore, I do not recommend that his promotion be withheld, nor do I recommend that he be required to show cause for retention.

A.R. II, p. 15.

were no "sworn charges against the officer...received by an officer exercising general court-martial jurisdiction over the officer ...[which] have not been disposed of" under 10 U.S.C. § 624(d)(1)(A)--the first statutory basis for a delay of promotion.

A Show Cause Authority reviewed Lt. Barnes' record and on March 19, 1998, two days after the March 17, 1998 memorandum, determined he should show cause before a Board of Inquiry ("BOI") why he should be retained in the Navy. A.R. IV, pp. 34-35. This notice was emailed to Lt. Barnes on the SS JOHN MCCAIN in the Arabian Gulf. On May 27, 1998, a BOI convened pursuant to SECNAVINST 1920.6A, determined Lt. Barnes had engaged in misconduct, but by a vote of 2 to 1 recommended he be allowed to remain in the Navy. A.R. V, pp. 1-51. The BOI, appointed on May 26, 1998 and meeting on May 27, 1998, did not satisfy the second of the five statutory bases for a promotion delay, the convening of a board of officers to review his record. 10 U.S.C. § 624(d)(1)(C). Even if the March 19, 1998 cause determination could be considered a convening of the board, it was two days after the delay memorandum and could not have satisfied that statutory grounds. *See Stringer v. United States*, 117 Ct. Cl. 30, 90 F. Supp. 375, 379 (1950) (government required to strictly comply with statutory time requirements). Furthermore, the BOI's decision on May 27, 1998 to retain Lt. Barnes was final, thus terminating that administrative procedure.[11] Accordingly, even if the Board proceedings were pending at the time of the March 17, 1998 delay memorandum, those proceedings were completed on May 27, 1998, thus terminating the Navy's self-imposed conditions on the delay.

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[11] 10 U.S.C. § 1182(d)(1) provides: "If a board of inquiry determines that the officer has established that he should be retained on active duty, the officer's case is closed."

The government does not point to evidence in the record of an ongoing investigation to determine whether any disciplinary action should be taken against Lt. Barnes, or any pending criminal charges against him, two of the other five types of permissible grounds to delay a promotion under 10 U.S.C. § 624(d).

That leaves the fifth and final grounds statutory grounds for delaying a promotion--cause to believe the officer is unqualified to perform the duties of the higher rank. 10 U.S.C. § 624(d)(2). The government asserts that the statement in the March 17, 1998 memorandum that Lt. Barnes may not be qualified for promotion satisfies the statute. Secondly, the government argues that questions about his qualification for promotion were outstanding--thus extending his promotion delay until such a determination was made.

To reiterate, subsection 624(d)(2) provides:

> [u]nder regulations prescribed by the Secretary concerned, the appointment of an officer under this section may also be delayed in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion.

SECNAVINST 1420.1A, ¶ 23(a) echoes the statutory language but does not add any procedural guidelines: "[p]romotion may be delayed under this instruction if:...(5) There is cause to believe that the officer is mentally, physically, morally, or professionally unqualified." The body of the March 17, 1998 memorandum to Lt. Barnes states that "[p]er reference (b)[the Navy regulation], you may

not be qualified for permanent promotion." While posing a question, this query does not answer that question and is not a finding of cause to believe Lt. Barnes was not mentally, physically, morally, or professionally qualified to perform the duties of the higher rank, neither does the memorandum refer to any cause finding. A question about Lt. Barnes' qualification for permanent promotion is not an administrative or disciplinary action nor a finding of cause to believe he was not qualified.

In addition to the December 19, 1997 report of Lt. Barnes' nonjudicial punishment, the header of the March 17, 1998 memorandum references only one other item, Navy regulation--SECNAVINST 1420.1A--and the government does not contend that Naval regulation contains any procedure for making such a cause determination. Rather, the government takes the position that memorandum's equivocation about Lt. Barnes' qualification for permanent promotion, and the several other record statements about his qualification for promotion, evince a separate administrative consequence of his misconduct that was outstanding prior to the March 17, 1998 delay memorandum, distinct from the nonjudicial punishment and Board of Inquiry proceedings. "The decision to promote an officer after disciplinary action is a natural administrative consequence of officer misconduct encompassed within the meaning of 'all administrative and disciplinary matters.'" Gov't Opposition at p. 27. The government however does not point to any record of such an administrative procedure, or a finding of cause to believe he was not qualified for his promotion, the latter being necessary to validate the March 17, 1998 delay and the former necessary to extend any such delay until completion of such a proceeding.

Clearly the Navy was not unfamiliar with a cause determination. Two days after the March 17, 1998 delay

memorandum, the Show Cause Authority found cause to question Lt. Barnes' retention in the Navy. Lt. Barnes was required and did show cause why he should be retained in the Navy before a Board of Inquiry. "Cause" to believe he was mentally, physically, morally, or professionally unqualified to perform the duties of the higher rank is a different issue. Citing MILPERSMAN 3410100.2.b.(2), the government argues that an administrative decision had to be made about whether or not Lt. Barnes' misconduct warranted a promotion delay or removal from the promotion list.[12] The administrative record cited by the government is as follows. On December 19, 1997, pursuant to requirements of the Military Personnel Manual ("MILPERSMAN") 3410100,[13] Lt. Barnes' Commanding Officer at Misawa, Japan sent a report of his non-judicial punishment to the Bureau of Naval Personnel as required by MILPERSMAN 1611-010(3). The letter report included his Commanding Officer's recommendation that he should be the last in his group to be promoted, but that his promotion not be withheld and he not be required to show cause why he should be retained. Lt. Barnes responded in a "First Endorsement" that emphasized his otherwise stellar Naval career and urged that his promotion not be delayed as recommended by his Commanding Officer. A.R. II., pp. 13-14. A Second

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[12] Although the government posits this argument in support of its assertion that there was an administrative proceeding pending as of August 24, 1998 which would validate the extension of the March 17, 1998 delay, the court also determines whether it supplies the necessary statutory grounds for the March 17, 1998 delay.

[13] MILPERSMAN 3410100 is now located at section 1611-010. The parties did not provide the court with the prior version. The court presumes there is no substantive difference between the two. Here, the report of non-judicial punishment was forwarded through the chain of command to the Chief of Naval Personnel who responded with the administrative show cause proceedings concerning Lt. Barnes' retention in the Navy, not a show cause proceeding as to his qualification for promotion.

Endorsement dated January 6, 1998 from his Commanding Officer forwarded the package. On February 4, 1998, the Commander, Naval Security Group Command, in Fort Meade, Maryland recommended to the Chief of Naval Personnel that Lt. Barnes be removed from the promotion list and required to show cause for retention in the Navy (the Third Endorsement). A.R. II, p. 11. This recommendation does not equate to a determination that there was cause to believe that Lt. Barnes was mentally, physically, morally, or professionally unqualified to perform the duties of the rank of Commander. Subsequently, on March 19, 1998, the Chief of Naval Personnel, in response to the December 19, 1997 letter, informed Lt. Barnes that a Show Cause Authority reviewed his case and determined there was "sufficient evidence of record to require you to show cause for retention in the Naval Service." A.R. II, pp. 5-6. While there was a show cause finding for retention, there was no show cause finding for fitness for promotion.

The government also cites to a February 19, 1998 memorandum from Lt. Commander R.C. Jensen, Acting Director of the Officer Performance Division to Commander Ann C. Stewart, the Director of Officer Promotions objecting to Lt. Barnes' promotion and noting in conclusory fashion that all administrative action in his case was not completed. A.R. VIII, p. 4. A superior officer's recommendation that Lt. Barnes be removed from the promotion list, and a conclusory statement by another superior officer that administrative action had not been completed as of February 19, 1998, do not satisfy the requirements of subsection (d)(2). The record's question about fitness for promotion cannot be elevated to statutory "cause." Assuming the March 17, 1998 query about his qualification could be construed as a finding of cause to believe he was not qualified for promotion, one of the five statutory bases for delay of promotion, the Navy expressly conditioned the term of that delay "until all related

administrative or disciplinary action is completed." There was no administrative or disciplinary action other than the non-judicial punishment which was completed before March 17, 1998, and the subsequent Board of Inquiry Proceeding which was completed on May 27, 1998, thus any period of delay terminated.

Moreover, under the government's reasoning, "cause" here was an extension of the nonjudicial proceedings and the Board of Inquiry. The court disagrees. "Cause" under subsection (d)(2) is a separate and additional statutory grounds for the delay. "[T]he appointment of an officer may **also** be delayed" if there is cause to believe that officer is not qualified for the promotion. The word "also" means something. Recharacterization of the other four statutory grounds for delay does not create a new statutory basis, at least without a separate administrative or disciplinary proceeding. The government's citations to the administrative record do not support its conclusion that any administrative or disciplinary action to determine such "cause" was either initiated, such as to validate the March 17, 1998 memorandum, or existed yet was uncompleted, to extend the promotion delay under the Navy's self-imposed terms. RCFC 56.1.

The court concludes that (1) there was no finding of cause to believe that Lt. Barnes was mentally, physically, morally, or professionally unqualified to perform the duties of the higher rank which could justify the delay in the first instance; and alternatively, (2) there was no ongoing related administrative or disciplinary proceedings concerning cause, the temporal parameters of the delay of Lt. Barnes promotion.[14] The court finds that none of the five conditions

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[14] Because of other statutory and regulatory errors, the court does not address whether subsection 624(d)(2) or due process would require the existence of regulations governing determination of cause to believe the

for promotion delay in 10 U.S.C. § 624(d)(1) or 624(d)(2) existed as of March 17, 1998. As a result, subsection 624(a)(2) mandates that the officer "shall" be promoted. *See generally Scarborough v. Principi*, 319 F.3d 1346, 1349 (Fed. Cir. 2003) (applying as mandatory the "shall" requirement that attorney fee applications under the Equal Access of Justice Act be submitted within thirty days). *See also Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1376 (Fed. Cir. 2002) (applying as mandatory statutory "shall"). The court also finds that all administrative or disciplinary action related to Lt. Barnes' nonjudicial punishment were completed on May 27, 1998, thus terminating the period of any promotion delay under the Navy's terms. The provisions of the statute and the terms of the Navy's delay having expired, Lt. Barnes was promoted by operation of law under subsection 624(a)(2).

The court is not impinging on military discretion on the merits of the decision to remove Lt. Barnes' name from the Senate-approved promotion list. Rather, the court is following statutory mandates, that like regulations, limit the government's discretion. The court is not ordering the promotion, but recognizing that the promotion occurred. *Law v. United States*, 11 F.3d 1061, 1065 (Fed. Cir. 1993).

Ratification by Secretary of Navy

Although not raised by plaintiff, the March 17, 1998 purported delay of Lt. Barnes' promotion was not ratified until August 24, 1998 by Bernard Rostker, Assistant Secretary of the Navy (Manpower and Reserve Affairs).

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officer is not mentally, physically, morally or professionally qualified for the promotion as a condition precedent to a delay of promotion under subsection 624(d)(2).

Navy regulation requires a delay of promotion be ratified by the Secretary of the Navy "as soon as practicable."

> **23. Delay of Promotion**
> **a. Criteria for Promotion Delay.**
> CHNAVPERS or CMC, as appropriate, or a member's commanding officer, may delay the appointment of an officer selected for promotion. If the appointment is delayed, the delaying officer shall, as soon as practicable, forward the information required by paragraph 23b to SECNAV for ratification. Promotion may be delayed under this instruction if:
> ...
> **b. Command Requests for Delay**
> (1) Commanding officers who consider delay of an officer's promotion warranted and delay an officer's promotion, shall submit justification for the delay to SECNAV via, CHNAVPERS (NMPC-82)(copy to COMNAVMILPERSCOM (NMPC-22)), or CMC (MMPR-1) as appropriate, within 10 days of knowledge of the circumstances warranting the delay, or as soon thereafter as practicable.
> (2) Each justification for delay to SECNAV must include the following documents:
> (a) A copy of the notification to the officer and;
> (b) A statement by the officer. If the officer declines to make a statement, the officer concerned shall submit a signed statement to that effect;
> (c) Supporting rationale for delay from the officer's commanding officer based on his or her knowledge of the officer involved; and
> (d) A recommendation by CHNAVPERS or DC/s (M & RA), as appropriate.

SECNAV INSTRUCTION 1420.1A, ¶ 23.

The government would be hard-pressed to argue that it was not practicable to obtain ratification in less than five months; however, because of the court's findings as to other procedural deficiencies in the delay of Lt. Barnes' promotion, the court does not reach this issue. The court notes however, that in the case of Commander Robinson, BCNR No. 11165-90 (Oct. 30, 1990) discussed *infra*, relief was granted by the Board of Correction of Naval Records where the Secretary of the Navy had not approved of his promotion delay prior to his original promotion date. Here, the effective date of Lt. Barnes promotion was April 1, 1998. The Assistant Secretary of the Navy did not ratify the delay until August 24, 1998.

> The Board finds, as it did in the prior cases at enclosures (8) and (9), that 10 U.S.C. 624(a)(2) ... requires that an officer's promotion be effected when due unless it is properly delayed. Since *no* Secretarial authority for the delay in Petitioner's case had been obtained when 1 June 1983 arrived, the Board concludes that his promotion *should* have been effected on that date, but was not. The Board does not accept Petitioner's proposition that the promotion took effect on that date by operation of law; however, the Board does find his record should be corrected to show the Secretary, acting for the President, appointed him to the grade of commander on that date.[15]

S.A.R., Tab 2, unnumbered 56, emphasis in original.

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[15] Semantics aside, the result is the same, absent Secretarial approval of his promotion delay, Robinson was promoted--whether titled a promotion as a matter of law or a promotion that should have been effected.

D. Immediate notification

Lt. Barnes also argues that the March 17, 1998 memorandum was not delivered to him before April 1, 1998, the effective date of his appointment as required by 10 U.S.C. § 624(d), and it was not "impracticable" to do so, the only exception to the statutory requirement that notice be given prior to the effective date. The government counters that Lt. Barnes, who was based in Misawa, Japan, was attached to USS JOHN S. MCCAIN, which was at sea patrolling the Arabian Gulf at the time, so it was "impracticable" to deliver the March 17, 1998 memorandum to him immediately. The March 17, 1998 memorandum was sent to plaintiff's Commanding Officer at Misawa, Japan. On April 9, 1998, the Executive Officer at Misawa, Japan notified the Chief of Naval Personnel who authored the memorandum that Lt. Barnes was out to sea but would be returned to Misawa as soon as possible. The Executive Officer did not want the letter mailed to Lt. Barnes because it may not have arrived until after he had already departed from the ship. The letter was given to Lt. Barnes on April 21, 1998 following his return to the base in Misawa, Japan.

Lt. Barnes was not given the March 17, 1998 notice until he returned from sea on April 21, 1998, which is too late plaintiff argues. Plaintiff also asserts that the Navy knew about the November 24, 1997 non-judicial punishment cited in the March 17, 1998 memorandum as reason for the delay and could have given Lt. Barnes notice earlier. The government defends the delay, asserting it was not practical to get the delay notice to plaintiff on the ship and it would have been improper and disrespectful for the Navy to inform him in that manner; therefore, under the circumstances, calling plaintiff back to Japan and giving him the notice in person was reasonable. The government also argues that the statute only requires notice of the grounds for the delay, not

notice of the delay itself. As plaintiff already was aware of the prior proceedings according to the government, any delay in getting the memorandum to him was inconsequential.

10 U.S.C. § 624(d)(3) requires notice of a promotion delay before the effective date of appointment, here April 1, 1998, unless "it is impracticable." "Impracticable" is defined as: "[i]mpossible to do or carry out." *The American Heritage Dictionary*, 3rd ed. 1992 at p. 908. It was not impossible to notify Lt. Barnes. The record indicates that on March 19, 1998, two days after the date of the March 17, 1998 memorandum, Lt. Barnes was informed via email that a Board of Inquiry was to be convened to consider his retention in the Navy. Clearly communication via email was possible. However, because of the court's rulings herein, and because determining when giving notice was practical in the military may impinge more on merits and timing decisions vice procedural determinations, it is not necessary to resolve this issue.

Ratification and extension of initial delay

On August 14, 1998, Rear Admiral Schmidt, Deputy Chief of Naval Personnel, communicated to the Secretary of the Navy, seeking ratification and extension of the delay of Lt. Barnes promotion "...until all related administrative actions are completed." A.R. IV, p. 12. The request was approved on August 24, 1998 by Assistant Secretary of the Navy Bernard Rostker. *Id.* Reference was made to the non-judicial punishment of October 15, 1997, the March 17, 1998 delay memorandum, and the Board of Inquiry's decision to retain Lt. Barnes.

Plaintiff argues that this August 24, 1998 attempt at further delay (assuming one gets beyond the validity and expiration of the March 17, 1998 delay memorandum) was defective

because: (1) the letter failed to give a supporting rationale as required by Paragraph 23(d) of the regulation; (2) any further d[illegible] had to be approved by the Secretary of the Navy under Paragraph 23(d) of the regulation, and Assistant Secretary Rostker lacked authority to extend the delay; (3) no temporal "period" of delay required by statute and Paragraph 23(d) was specified; and (4) Lt. Barnes was not notified that the delay was being extended, nor afforded an opportunity to respond as required by both statute and regulation. Therefore, the extension of delay being ineffective, Secretary Danzig's subsequent removal of his name from the promotion list (discussed hereinafter) was ineffective as plaintiff had already been promoted by operation of law.

A promotion may not be delayed more than six months from the original effective promotion date unless the Secretary specifies a further period of delay. 10 U.S.C. § 624(d)(4) ("An appointment of an officer may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay."). Navy regulations also contain the six month maximum unless a further "period of delay" is specified. Paragraph 23(d) of SECNAVINST 1420.1A provides:

> **d. Limitations on Delay.** The promotion of an officer may not be delayed under this paragraph for more than six months after the date on which the officer would otherwise have been promoted, unless SECNAV specifies a further period of delay. The CHNAVPERS or CMC will submit timely requests, with supporting rationale, for any extension of delay of promotion. An officer's promotion may not be delayed more than 90 days after final action has been taken in any criminal case against the officer in a Federal or state court, more

> than 90 days after final action has been taken in any court-martial against the officer, or more than 18 months after the date on which the officer would otherwise have been promoted, whichever is later.

(emphasis added).

August 14, 1998 is less than six months from April 1, 1998, the effective date of promotion; accordingly, the request for extension was not untimely. The request for ratification and extension was by the Chief of Naval Personnel to the Secretary of the Navy in compliance with the regulation. The next inquiry is whether a further "period of delay" as required by both the statute and the regulation was specified? Plaintiff argues a period of time must be in calendar increments. The government disagrees, asserting that the request for an extension "until all related administrative actions are completed" properly defined a specified period of delay. "Period" is defined in the American Heritage Dictionary (3rd ed. 1996) in part as "an interval of time characterized by the occurrence of a certain condition, event or phenomenon: *a period of economic prosperity*." The court finds that as long as other time constraints of the statute are met, the specification of a period of delay by reference to events such as the completion of administrative and other procedures was not improper.

The ratification and extension of the delay was approved by Bernard Rostker as Assistant Secretary of the Navy for Manpower and Reserve Affairs. Lt. Barnes argues that Assistant Secretary Rostker lacked express authority to extend the delay and that the Secretary's authority is non-delegable, *citing In re Robinson*, BCNR No. 11165-90 (October 30, 1990). *Robinson* cited a JAG advisory opinion in a previous case that the Secretary's power to delay a promotion was not-delegable. The JAG opinion that was submitted to the Board for Correction of Naval Records in

Lt. Barnes' case corrected that earlier opinion and opined that in this instance, Assistant Secretary Rostker had appropriate authority to extend Lt. Barnes' promotion delay.

The court concludes that if the delay had been effective and/or had not expired of its own terms, Assistant Secretary Rostker had authority to act on behalf of the Secretary to ratify and extend the promotion delay. Assistant Secretary Rostker's principal duty was the supervision of Naval manpower affairs. 10 U.S.C. § 5016. He had authority to act for the Secretary in personnel matters. 32 C.F.R. § 700.203(e) (1998) ("The Assistant Secretary of the Navy [Manpower, Reserve Affairs and Logistics] is responsible for the overall supervision of manpower and reserve component affairs of the Department of the Navy"); 32 C.F.R. § 700.203(b) (1998) ("The Civilian Executive Assistants [defined in Section 700.203(a) as including the Assistant Secretaries of the Navy] are authorized and directed to act for the Secretary within their assigned areas of responsibility"); SECNAVINST 1420.1A, ¶ 26(a) (the Assistant Secretary of the Navy is responsible for the "management oversight of the Promotion" systems); SECNAVINST 5430.7L5(c) (the Assistant Secretaries are "authorized and directed to act for the Secretary of the Navy throughout the Department of the Navy within his assigned area of responsibility" and are responsible for the overall supervision of the manpower and military personnel affairs). The court agrees with the government that the delay of an officer's promotion falls within the realm of administration of manpower and reserve affairs. Assistant Secretary Rostker had authority to ratify and extend the delay of Lt. Barnes' promotion assuming the initial delay had complied with procedural requirements.

The court rejects plaintiff's argument that his delay could not be longer than 90 days from the December 12, 1997

report of his nonjudicial punishment. Subsection 624(d)(4) limits delay to no more than 90 days following completion of court-martial proceedings or a criminal case, or more than 18 months after the date the original date of the officer's promotion--here April 1, 1998. The purported extension of August 14, 1998, less than 18 months thereafter, was not untimely.

Plaintiff also argues that the August 14, 1998 letter does not contain the supporting rationale required by ¶ 23d, and that the non-judicial punishment proceedings and the Board of Inquiry were completed and could not serve as "supporting rational" which, must be supplied by the officer's commanding officer and based on his or her knowledge must accompany "[e]ach justification for delay." ¶ 23b(2). The further period of delay cannot be the same as the initial period of delay, plaintiff argues because a "rationale" under ¶ 23(d) must be something new. Finally, plaintiff argues he did not get written notice as required by subsection 624(d)(3)--and it was not impracticable to do so. Lt. Barnes was not given a copy of the August 14, 1998 and August 24, 1998 actions until they were obtained through the Freedom of Information Act.

In response, the government argues the August 14, 1998 memorandum's reference to his non-judicial punishment, and to the March 17, 1998 promotion delay memorandum were sufficient notification because subsection 624(d)(3) only requires notice of the grounds for delay. The government also argues notice applies only to the initial delay, not to any extension.

The court concludes that while subsection 624(d)(3), cited above, provides for written notice of the grounds for delay, not of the delay itself, the officer also has the right to make a written statement in response to the delay action taken. ("An

officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken."). Under the government's interpretation, an officer, aware of prior misconduct would have to be clairvoyant to predict all actions the government could take. In order to read these sections harmoniously, the officer must know about the delay in order for the officer to respond. Lt. Barnes was not "afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken" in the August 14, 1998 memorandum as required by statute. 10 U.S.C. § 624(d)(4).[16] Furthermore, SECNAVINST 1420.1A ¶ 23(b)(2) mandates that "each justification for delay to SECNAV must include ...[a] copy of the notification to the officer." No notification was given to Lt. Barnes.

Removal

On September 8, 1998, the Chief of Naval Personnel, referring to SECNAVINST. 1420.1A, notified Lt. Barnes that his name may be removed from the Fiscal Year 98 Active Lieutenant Commander Line Promotion List. He was afforded an opportunity to submit a statement within ten days. A.R. IV, p. 10. Lt. Barnes submitted favorable statements from his commander and others. On March 22, 1999, Chief of Naval Personnel recommended that his name be removed from the promotion list. A.R. IV, p. 2. That recommendation was approved on April 26, 1999 by Secretary Richard Danzig. A.R. IV, p. 2.

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[16] The court also rejects the government's argument that the officer is entitled only to notice of the initial delay. The notice provision of 10 U.S.C. § 624(d)(3) applies to delays "under this subsection"--the entire subsection (d) of Section 624.

Removal from a promotion list is governed by SECNAVINST ¶ 23(e):

> **e. Removal from the Promotion List.** If during a delay of promotion, it is determined that removal from the promotion list is appropriate, removal action under paragraph 17a may be initiated. Although removal action is contemplated, requests for delay extensions as provided in paragraph 23d shall be submitted to SECNAV as necessary until the officer's name is removed from the promotion list.

Paragraph 17a provides:

> SECNAV may remove the name of any officer from a promotion list to any grade below 0-7. CHNAVPERS or CMC, as appropriate, may submit requests for such action to SEC-NAV.

The government's position is that the name of the officer can be removed from a promotion list at any time prior to appointment. That position conflicts with the above regulatory constraints that removal action be initiated during a period of promotion delay. Even if the promotion was delayed without compliance with statutory procedure, Lt. Barnes cannot be appointed Lt. Commander--only the President can do that, the government argues. Indeed, the government's position in this case is that the President's authority to remove a name from a promotion list is absolute and unaffected by the constraints of the mandatory "shall" of § 624(a)(2).[17]

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[17] Mc*Carthy v. United States*, 7 Cl. Ct. 390 (1985), *rev'd*, 785 F.2d 326 (Fed. Cir. Dec. 26, 1985) (Table), cited by the government as a summary reversal of a finding of promotion as a matter of law due to procedural delays in the promotion delay, is not inconsistent with the court's findings herein. In *McCarthy*, the applicable statute required prompt

The court's recognition that Lt. Barnes' promotion was *effected does not impact* any substantive military promotion decision. Statutory mandates limit military discretion and constrain delays of Senate confirmed promotions. This is consistent with *Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993), relied on by the government, which found compliance with the statutory requirements for delay of a promotion in the Coast Guard. *Law*'s analysis of the Coast Guard's compliance with the delay provisions and conclusion that the delays in Lieutenant Law's promotion complied with the statute, is consistent with the analysis applied here, albeit reaching a different conclusion. Distinguishing authority holding that the judiciary is without authority to grant a promotion, the Federal Circuit held that the Court of Federal Claims had jurisdiction to grant relief if the appointment had

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action to end a promotion delay as soon as the grounds for the delay no longer existed. The court determined that the basis for the delay no longer existed; there was no further need to evaluate the officer's conduct; there was no further grounds to delay the promotion. Accordingly, the failure to promptly end the period of delay was an abuse of discretion. 7 Cl. Ct. at 395. The summary unpublished reversal by the Federal Circuit is of questionable precedence. More importantly, the Federal Circuit's clear pronouncements in *Law*, and others, have guided this court. Finally, in this case the court has applied objectively determinable record facts to statutory and regulatory mandates.

Likewise, *D'Arco v. United States*, 194 Ct. Cl. 811, 441 F.2d 1173, 1175 (1971) relied on by the government for the president's unfettered right to remove a name from a promotion list, did not involve questions of the government's compliance with statutory, regulatory and self-imposed limitations on delay, and is thus distinguishable. *Moore v. United States*, 5 Cl. Ct. 457 (1984), noting recent legislation that limited promotion delays, applied prior law which did not; *Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988) concerned termination of Special Pay to which a physician was otherwise entitled, which while not reviewable on the merits, was subject to review for compliance with procedural constraints. These, as well as the other cases relied on by the government, are inopposite.

been effected because of improper delay--if Lt. Law's arguments about improper delay of promotion were meritorious. "That Law's claim fails on the merits does not negate the court's jurisdiction." *Id.*, at 1065. Here the court has found Lt. Barnes arguments about improper delay meritorious.

The court does not promote Lt. Barnes. The Navy's delay accomplished his promotion. The court is not granting Lt. Barnes promotion but only recognizing that it occurred. *Law*, 11 F.3d at 1065. The President and Senate approved and confirmed his promotion effective April 1, 1998. Under the clear language of subsection 624(a)(2), that promotion "shall" occur unless there was compliance with the five delay provisions. Any delay must have complied with applicable statutes and regulations as well as the Navy's determination of the duration of the delay--until all administrative and disciplinary proceedings related to his nonjudicial punishment were completed. The court concludes that the Navy failed to comply with these limitations, and therefore, under the statute, Lt. Barnes' promotion was effected. Accordingly, the purported removal of Lt. Barnes name from the promotion list was of no effect. The court finds Lt. Barnes was legally entitled to the promotion and is entitled to the pay that should have accompanied that accomplishment. This result necessarily overturns his release from active duty as he has not been passed over for promotion in his correct rank to which he was promoted.

Decisions of Board of Correction of Naval Records

On May 16, 2000, Lt. Barnes submitted an Application for Correction of Naval Records. On May 17, 2000, the court stayed this litigation pending the Board's decision. On

January 11, 2001, the Board denied the Application.[18] In his application Lt. Barnes argued that he was promoted as a matter of law and, alternatively, that relief should be granted to correct an error or injustice as had been done in similar cases, particularly *In re Robinson*, BCNR No.11165- 90, Oct. 30, 1990. The Board determined that Lt. Barnes was not promoted as a matter of law; equitable arguments were not addressed. On November 26, 2001, the Assistant General Counsel (Manpower and Reserve Affairs) requested the Board "provide a report that addresses whether petitioner is entitled to be promoted in order to correct an error or injustice," because "the [January 11, 2001] decision provides no detailed explanation regarding petitioner's entitlement to purely equitable relief." Second Supp. A.R. at 2-3. On December 4, 2001, the court continued its stay pending the Board's reconsideration. On December 19, 2001, the Board found insufficient evidence of probable material error or injustice. In concluding that equitable relief was not warranted, the Board concluded that Lt. Barnes "came to the Board with unclean hands, noting the misconduct which resulted in the delay of [his] promotion and [his] ultimate removal from the promotion list." Second Supp. A.R. at 2. Distinguishing *Robinson*, the Board noted that relief was granted there not on equitable grounds but because "*no* Secretarial authority for the delay of [Robinson's] promotion had been obtained when his projected promotion date arrived, his promotion should have been effected on that date in accordance with title 10 of the United States Code, section 624(a)(2)." *Id.*

The standard of review of a decision of a corrections board is whether the decision is arbitrary, capricious, unsupported

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[18] "After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice." S.A.R., Tab 6.

by substantial evidence or contrary to law. *Chappell v. Wallace*, 462 U.S. 296, 303, 103 S. Ct. 2362, 2367, 76 L. Ed. 2d 586 (1983); *Haselrig v. United States*, 333 F.3d 1354, 1356 (Fed. Cir. 2003); *Martinez v. United States*, 333 F.3d 1295, 1313-14 (Fed. Cir. 2003); *Porter v. United States*, 163 F.3d 1304, 1312 (Fed. Cir. 1998).

Lt. Barnes argues the Board's decisions were arbitrary, capricious, unsupported by substantial evidence and contrary to law because of legal errors discussed above, and because of the Board's invocation of the doctrine of unclean hands. He asserts the Board granted equitable relief to individuals who engaged in much more egregious behavior; to impose a higher standard or eliminate a previous standard without warning would be arbitrary and capricious. Plaintiff cites two previous cases where the Board made legal and equitable determinations inconsistent with those applied to Lt. Barnes. In one (No. 6971-87; July 22, 1987) the Board concluded that the officer's promotion delay had not been approved by the Secretary as required by Navy regulation. Recognizing that his promotion occurred because the Secretary of the Navy had not approved of the promotion delay before the scheduled promotion date (an infirmity in Lt. Barnes' purported delay), the Board concluded that:

> since no legally valid delay had been effected, Title 10 U.S.C. 624(a)(2) made it mandatory that petitioner, who was an officer on a promotion list for his competitive category, be promoted to the next higher grade when additional officers in that grade and competitive category were needed.... To avoid a requirement to effect Petitioner's promotion, all that would have been needed would have been to obtain a summary Secretarial review and approval of a delay request before the date the promotion was scheduled. However, since this was not done, the Board finds that

> Petitioner's promotion should have been effected when scheduled.

Plaintiff's Cross-Motion, App. unnumbered 9.

The Board recommended his promotion be recognized with appropriate record correction despite that fact that following Senate confirmation of his promotion, there was investigation into serious allegations which led to a Board of Inquiry. The Board of Inquiry found insufficient evidence to support the allegations, but concluded that while the officer should be retained in the Navy, he should be removed from the promotion list because of findings that the officer served alcohol, showed pornographic movies to juveniles without their parent's consent and often consumed alcohol to excess at social functions and then carelessly discussed official matters.

In the other case cited by Lt. Barnes (6532-96; August 4, 1998), a Marine sought reinstatement and promotion. Allegations of misconduct involved sexual harassment of and fraternization with an enlisted female Marine and conduct unbecoming an officer. The Board concluded that no action was taken to extend an initial promotion delay beyond six months as required by subsection 624(d)(4); consequently, the officer should have been promoted the following day. Plaintiff's Cross-Motion, App. unnumbered 45.

In *Robinson*, the Board opined that his promotion should have been effected because the Secretary of the Navy had not approved the delay before the promotion's effective date. While not acknowledging the concept of promotion by operation of law, the Board in Robinson concluded that the lack of Secretarial approval of a delay prior to the effective date of the promotion was an error and an injustice

warranting relief. The Board recognized that under Section 624(a)(2) the promotion occurred absent a delay that complied with statutory and regulatory requirements. It is unfortunate that this recognition did not occur here.

The several failures to comply with statute and regulations in the attempt to delay Lt. Barnes' promotion were legal error. "[L]egal error includes the military's 'violation of statute, or regulation, or published mandatory procedure...'" *Dodson v. United States*, 988 F.2d 1199, 1204 (Fed. Cir. 1993), *citing Skinner v. United States*, 594 F.2d 824, 830, 219 Ct. Cl. 322 (1979). *See also Muse v. United States*, 21 Cl. Ct. 592, 608 (1990) ("the failure of the rating officials to follow their own regulations was legal error."). Alternatively, plaintiff argues the Board's December 2001 decision denying equitable relief was arbitrary and capricious. In the three prior Board cases cited by Lt. Barnes the promotion was effected because of improper delay. In *Robinson*, as in Lt. Barnes' case, there was no Secretarial approval of the officer's delay prior to its projected effective date. In *Robinson*, *citing* subsection 624(a)(2), the Board found the promotion occurred; in Lt. Barnes' case, the Board found the promotion did not occur. In the other two cases there were irregularities in the delay and the Board found the officers should have been promoted; in Lt. Barnes' case, the Board found the promotion did not occur. "'An agency is obligated to follow precedent, and if it chooses to change, it must explain why.'" *British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997), *citing M.M & P. Maritime Advancement, Training, Educ. & Safety Program v. Dept. of Commerce*, 729 F.2d 748, 755 (Fed. Cir. 1984). The government offered no rationale for the legal distinctions. As for the equitable distinctions, the government asserts that equity always involves weighing of fault and fault was not personal in *Robinson* where the officer was held responsible, not because of any personal

involvement, but because he was the commanding officer for a military operation that went terribly awry. In contrast, Lt. Barnes engaged in personal conduct of fraternizing with enlisted subordinates, conduct unbecoming an officer. While that is true, Commander Robinson was found to be personally culpable and personally disciplined. In the other two cases, the officer's improprieties at least approximated those of Lt. Barnes. Relief was granted in previous cases where hands were at least as dirty as Lt. Barnes. Degree of culpability and unclean hands were never mentioned in the other decisions and the government offered no reason why the doctrine of "unclean hands" was applied to Lt. Barnes and not to the other officers. See *Houston v. United States*, 156 Ct. Cl. 38, 297 F.2d 838, 842 (1962) (the arbitrary and capricious standard is met when an agency acts on "a mere whim or caprice."). However, because of the court's finding that the Board's decision was contrary to law, the court need not address whether Lt. Barnes' case was treated differently and therefore arbitrarily.

Conclusion

For the foregoing reasons, plaintiff's motion for judgment on and administrative record is **GRANTED** and the government's motion is **DENIED**. The parties are directed to consult and propose, by agreement if possible, the terms of judgment and file a Joint Status Report by **July 31, 2003**.

APPENDIX D

United States Court of Appeals,
Federal Circuit.

Rear Admiral (LH) Noel K. DYSART,
Medical Corps, U.S. Navy (Ret.),
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

No. 03-5106.

Decided: May 26, 2004.

Before RADER, DYK, and PROST, Circuit Judges.

DYK, Circuit Judge.

On June 12, 1998, the President removed appellant Rear Admiral (Lower Half) Noel K. Dysart from the promotion list for the grade of rear admiral in the United States Navy ("Navy"). The appellant filed suit in the Court of Federal Claims, asserting that he had been automatically promoted to that grade as of September 1, 1997, and that he was entitled to the corresponding pay and benefits. In addition, the appellant sought reinstatement to the Navy and asserted a separate claim for medical additional special pay ("MASP"). The Court of Federal Claims granted summary judgment for the government on the administrative record. *Dysart v.*

United States, No. 02-294C (Fed. Cl. May 5, 2003). We affirm.

BACKGROUND

I

This case presents significant questions concerning the appointment process for military officers. The Constitution provides that the President has the authority to nominate and, "by and with the Advice and Consent of the Senate," to appoint "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Three separate actions are ordinarily required for a person to be appointed to office pursuant to this provision: the President's nomination, confirmation by the Senate, and the President's appointment after Senate confirmation. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 155-56, 2 L. Ed. 60 (1803). In accordance with this process, the President first selects a nominee and sends the nomination to the Senate. The Senate acts on the nomination and determines whether or not to confirm the nominee. If the nominee is confirmed, the President appoints the officer and signs a commission or performs some other public act as evidence of the officer's appointment. *See id.* at 157. The Constitution also provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

A naval officer is an "Officer of the United States" in accordance with Article II. *See United States v. Mouat,* 124 U.S. 303, 307, 23 Ct. Cl. 490, 8 S. Ct. 505, 31 L. Ed. 463 (1888) (holding that a naval officer who "holds his place by virtue of an appointment by the president" is an "officer of the United States"). The permanent promotion of a military officer to a higher grade, as well as his initial appointment, is subject to this constitutional process. *See Weiss v. United*

States, 510 U.S. 163, 174, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) (holding that "the Appointments Clause [cannot be circumvented] by unilaterally appointing an incumbent to a new and distinct office"), *aff'g* 36 M.J. 224, 227 (C.M.A. 1992) ("All regular officers of the military services are appointed by the President and confirmed by the Senate.... Active duty military officers are appointed and confirmed again upon each promotion to a grade above pay grade O-3."); *Shoemaker v. United States*, 147 U.S. 282, 300-01, 13 S. Ct. 361, 37 L. Ed. 170 (1893).[1]

Beginning in 1916, Congress attempted to regularize the promotion process for military officers, including naval officers. In particular, Congress directed the Navy to use a process involving selection boards for promoting naval officers to fill vacancies in the grades of commander, captain, and rear admiral. *See* Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 578-79. Pursuant to the statute, a selection board selected officers in a particular grade to fill vacancies in the next higher grade and submitted a report with its recommendations "to the President for approval or disapproval." *Id.*, 39 Stat. at 579. The selection board process was expanded in 1947 to encompass the promotions of all naval officers to grades above lieutenant (junior grade). *See* Officer Personnel Act of 1947, § 104(a), 61 Stat. 795, 800.

In 1980, the Defense Officer Personnel Management Act ("DOPMA"), Pub. L. No. 96-513, 94 Stat. 2835 (1980), was enacted. DOPMA provides for selection boards, which recommend officers between the grades of lieutenant (junior

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[1] The President has the authority to make temporary appointments and promotions outside of the constitutional process in times of war or national emergency. *See* 10 U.S.C. § 603 (2000).

grade) and rear admiral (lower half)[2] (in the Navy) and first lieutenant and brigadier general (in the Army, Air Force, and Marine Corps) for promotion to the next higher permanent grade. *See* 10 U.S.C. § 611(a) (Supp. I 2001). The board submits its recommendations in a written report to the Secretary of the appropriate military branch. *See* 10 U.S.C. § 617 (2000). After reviewing the report, the Secretary submits the report "to the Secretary of Defense for transmittal to the President for his approval or disapproval." *Id.* § 618(c)(1). The statute also requires the Secretary concerned to place the names of the approved officers within particular categories (called "competitive" categories) on a promotion list in order of their seniority once the President has approved the selection board's report. *See id.* § 624(a)(1). The statute provides:

> [O]fficers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed. Promotions *shall be made* in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

Id. § 624(a)(2) (emphases added).

The statute also provides that the Secretary may prescribe regulations that provide for the delay of an officer's

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[2] DOPMA originally designated this grade as "commodore admiral." *See* § 105, 94 Stat. at 2851. In 1981, the grade was changed to "commodore," *see* Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 405, 95 Stat. 1099, 1105 (1981), and it was again changed to "rear admiral (lower half)" in 1985, *see* Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 514, 99 Stat. 583, 628 (1985).

appointment if "there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." *Id.* § 624(d)(2). Pursuant to this authority, the Secretary has promulgated regulations in paragraph 23 of Secretary of the Navy's Instruction ("Secretary's Instruction") 1420.1A. The statute and regulations impose two limitations on the Secretary's authority to delay an officer's appointment in accordance with subsection 624(d). First, the officer whose appointment has been delayed must be "given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." *Id.* § 624(d)(3). Second, the officer's appointment "may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." *Id.* § 624(d)(4). The regulations include similar provisions. *See* Secretary's Instruction 1420.1A ¶ 23 (1991).

The current statute, like its predecessor, states that appointments are made "by the President, by and with the advice and consent of the Senate," *id.* § 624(c); 10 U.S.C. § 5791 (1976) (repealed 1980).[3] The Navy follows a formal process of nomination, confirmation, and appointment for its officers, apparently designed to take account of the constitutional requirements. In accordance with the statute, the Secretary of the Navy convenes selection boards and approves their selections. *See* 10 U.S.C. §§ 611(a), 618(a).

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[3] The statute provides that appointments of junior officers--to the grades of lieutenant (junior grade) or lieutenant (in the Navy) and first lieutenant or captain (in the Army, Air Force, and Marine Corps)-- are "made by the President alone." 10 U.S.C. § 624(c). The President has delegated this authority to the Secretary of Defense. *See* Exec. Order No. 12,396, § 1(c), 3 C.F.R. 234 (1983), *reprinted in* 3 U.S.C. § 301 (2000).

The selections are forwarded to the Chairman of the Joint Chiefs of Staff, if required; the Secretary of Defense; and the President, who may remove names from the recommended list. *See id.* § 618(b)-(d). The President then nominates officers from the recommended list and forwards the nominations to the Senate. *See generally* Department of Defense Instruction 1320.4 (1995) (providing regulations governing the nomination processes of the military branches). If an officer is not confirmed by the Senate, his name must be removed from the promotion list. 10 U.S.C. § 629(b). Once the officer has been confirmed by the Senate, he must next be appointed. For example, when an officer is appointed to the grade of rear admiral, the Special Assistant for Flag Officer Management and Distribution prepares a letter of appointment, which can only be signed with the express approval of the Secretary of the Navy, acting for the President. This letter is issued to the appointee, along with a certificate of appointment. The appointee need not formally accept the appointment, as "[a]n officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. § 626(a). The Secretary concerned determines the date of the appointment, pursuant to 10 U.S.C. § 741(d).[4] *See id.* § 624(b)(2).

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[4] Section 741(d) provides, in pertinent part:

> (1) The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment shall be determined by the Secretary of the military department concerned at the time of such appointment. The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment and who at the time of such appointment was awarded service credit for prior commissioned service or constructive credit for advanced education or training, or special experience shall be determined so as to reflect such prior commissioned service or constructive service. Determinations by the Secretary concerned

II

A

In this case, a selection board selected the appellant for promotion to rear admiral in the fall of 1995. The President approved the selection board's recommendation, and the appellant was nominated by the President to be rear admiral on March 20, 1996. *See* 142 Cong. Rec. 5,626 (1996). The appellant was confirmed by the Senate on June 20, 1996, *see* 142 Cong. Rec. 14,827 (1996), and he was placed on the Staff Corps Flag Officer Promotion List with a projected promotion date of September 1, 1997. On January 24, 1997, the Office of the Chief of Naval Operations informed the appellant that the Secretary of the Navy was considering recommending that the appellant's name be removed from the promotion list. The officer who was next in line behind the appellant for promotion to rear admiral was promoted on September 1, 1997. On September 11, 1997, Chief of Naval Personnel notified the appellant that his promotion to the grade of rear admiral was delayed. Two additional officers were promoted to rear admiral on March 1, 1998, and June 1, 1998, respectively.

On September 26, 1997, the Secretary of the Navy recommended that the appellant's name be removed from the promotion list, and the President removed the appellant's name from the promotion list on June 12, 1998, more than six months after the September 1, 1997, date on which the

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under this paragraph shall be made under regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

(2) Except as otherwise provided by law, the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade.

10 U.S.C. § 741(d)(1)-(2) (Supp. I 2001).

officer next-in-line to the appellant was promoted.[5] The reasons for the President's removal of the appellant's name from the promotion list need not detain us. In essence, the Secretary of the Navy recommended to the President that the appellant's name be removed because the appellant had received an adverse fitness report from his commanding officer, Vice Admiral Koenig, concerning the conduct of the appellant's relationship with a woman during the period after he had become separated from his wife. As discussed in greater detail below, one question is whether the appellant had automatically been promoted in accordance with subsection 624(a)(2) before the President removed his name from the promotion list. Another is whether the President was obligated to appoint him. Because the Navy viewed him as not promoted, the appellant was required to retire from active duty on February 28, 2002, when he reached the maximum permissible tenure in the grade of rear admiral (lower half).

B

The appellant also submitted a request for MASP to the Chief of the Bureau of Medicine and Surgery on December 4, 1996. MASP is "[a]n entitlement for medical corps officers who agree to remain on active duty for a period of not less than 1 year as computed from the effective date of the [MASP] agreement," provided as additional pay to enhance the retention rate of such officers. Secretary's Instruction 7220.75C ¶ 7 (1990). The appellant sought MASP in the amount of $15,000 for the period from January 1, 1997 to December 31, 1997. An officer seeking MASP

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[5] The President has the authority to "remove the name of any officer from a list of officers recommended for promotion." 10 U.S.C. § 629(a). He has delegated this authority to the Secretary of Defense, but only for grades below rear admiral (lower half) (in the Navy) and brigadier general (in the Army, Air Force, and Marine Corps). *See* Exec. Order No. 12,396, § 1(b).

must "[d]emonstrate an adequate level of military and professional performance as determined and documented by the commanding officer." *Id.* ¶ 7a(1). The appellant's request for MASP was denied, based at least in part on Vice Admiral Koenig's adverse fitness report, on January 13, 1997. The appellant argues that the fitness report was improper and that he is entitled to MASP if the fitness report is held invalid.

C

On March 26, 1998, the appellant applied to the Board for Correction of Naval Records ("Board"), seeking removal of Vice Admiral Koenig's fitness report from his records. The appellant also sought the restoration of his name to the promotion list, promotion to rear admiral effective September 1, 1997, and payment of MASP, arguing that the removal of his name from the promotion list and the denial of MASP were based on the allegedly improper fitness report. On January 29, 2002, the Board recommended that the Secretary of the Navy provide all of the relief sought by the appellant. However, the Assistant Secretary of the Navy for Manpower and Reserve Affairs[6] rejected the Board's recommendation and denied the appellant's requested relief.

On April 8, 2002, the appellant brought suit in the Court of Federal Claims, alleging that he had been automatically promoted to rear admiral as of September 1, 1997. He sought the corresponding pay and benefits of that grade along with the MASP of $15,000 that he had been denied. In addition, because the appellant was required to retire from active duty on February 28, 2002, he sought reinstatement to

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[6] The Secretary of the Navy has delegated the responsibility for supervision of the Board to the Assistant Secretary of the Navy for Manpower and Reserve Affairs. *See* 32 C.F.R. § 700.324(b) (2003).

the Navy. The Court of Federal Claims granted the government's motion for summary judgment on the administrative record. The court held that the President's removal of the appellant's name from the promotion list was proper and, therefore, that he had not been promoted by operation of law. *Dysart,* slip op. at 15-16. The court also held that the appellant's claim for MASP was non-justiciable because there was no procedural error in the Navy's denial of MASP. *Id.* at 17-18 (citing *Voge v. United States,* 844 F.2d 776, 779 (Fed. Cir. 1988)). The appellant timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal determinations such as the Court of Federal Claims' decision to award summary judgment on the administrative record without deference, applying the same standard of review as the Court of Federal Claims. *Haselrig v. United States,* 333 F.3d 1354, 1355 (Fed. Cir. 2003). Accordingly, we must uphold the Secretary's decision denying the appellant's relief unless the Secretary "acted in a manner that is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Id.*

I

The appellant argues that he was promoted by operation of law on September 1, 1997, when the officer next-in-line to him was promoted, and before the President removed his name from the promotion list on June 12, 1998. The appellant recognizes that the statute and regulations provide a mechanism for delaying an appointment, *see* 10 U.S.C. § 624(d); Secretary's Instruction 1420.1A ¶ 23, but he alleges that the attempt to delay his appointment was improper and ineffective under the statute and regulations. First, the appellant argues that the January 24, 1997, letter did not

constitute "written notice of the grounds for the delay." 10 U.S.C. § 624(d)(3); Secretary's Instruction 1420.1A ¶ 23c. Second, he argues that the September 11, 1997, letter informing him that his promotion was delayed came after he had already been automatically promoted. Third, he argues that, even if his promotion were properly delayed, it could not have been delayed for more than six months after September 1, 1997, when the officer next-in-line to the appellant was promoted, because the Secretary did not specify any "further period of delay," 10 U.S.C. § 624(d)(4). The government responds with three arguments. First, the government argues that the statute cannot provide for automatic appointments because the appointment power is entirely within the President's discretion. Second, the government argues that the promotion was properly delayed. Finally, the government argues that any violation of section 624(d) was harmless. We need not reach the government's second two arguments because we agree with the first. The constitutional process allows the President complete discretion in choosing whether or not to appoint an officer. The statute does not and cannot alter that process by providing for automatic appointment.

A

1

The constitutional appointment process for Senate-confirmed officers of the United States is most famously described in *Marbury v. Madison*. Under the Constitution, the President is given the authority to appoint officers "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. As noted above, *Marbury* set forth three separate actions that are ordinarily required for a person, subject to Senate confirmation, to be appointed to office: the President's nomination; confirmation by the Senate; and the President's appointment. *See* 5 U.S. (1 Cranch) at 155-56. Each discrete action--nomination, confirmation, and

appointment--must be made for a promotion to be effective. As an early opinion of the Attorney General correctly noted:

> To constitute an appointment under [Article II], it is necessary--1st, that the President should nominate the person proposed to be appointed; 2d, that the Senate should advise and consent that the nominee should be appointed; and, 3d, that, in pursuance of such nomination and such advice and consent, the appointment should be actually made.
> The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate, that it should be made sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not divest the executive authority of the discretion to withhold the actual appointment from the nominee. To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being the evidence that the purpose of appointment signified by the nomination has not been changed.

4 Op. Atty. Gen. 217, 219-20 (1843). For judicial officers, such as those involved in *Marbury* itself, the appointment is manifested by the President's signing of a commission. *See also United States v. Le Baron,* 60 U.S. (19 How.) 73, 78, 15 L. Ed. 525 (1856). However, the granting of a commission is not always required for a Presidential appointment. The Court noted that, "[i]n order to determine whether [an officer] is entitled to [a] commission, it becomes necessary to enquire whether he has been appointed to the office." *Marbury,* 5 U.S. (1 Cranch) at 155. The Court ruled:

> The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.
>
> ....
>
> Some point of time must be taken when the power of the executive over an officer ... must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed.

Id. at 157. In *Marbury,* the "last act to be done by the president" to show that Marbury had in fact been appointed was "the signature of the commission." *Id.* However, the Court noted that, "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer." *Id.* at 156.

The actual process followed with respect to senior military officers follows the constitutional design. The President nominates officers from the promotion list provided to him by the military department, and those officers are confirmed by the Senate.[7] In accordance with the Constitution, the President must then make a public act of appointment for an officer to be promoted.

2

In the case of a promotion to the grade of rear admiral, the final public act of appointment is the signing and issuance of the letter of appointment by the Special Assistant for Flag Officer Management and Distribution on behalf of the President. Although the letter of appointment is typically

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[7] As noted above, appointments to the grades of lieutenant (junior grade) or lieutenant (in the Navy) and first lieutenant or captain (in the Army, Air Force, and Marine Corps) are "made by the President alone." 10 U.S.C. § 624(c).

accompanied by a certificate of appointment, which is the formal document most like a commission for promoted naval officers, the certificate is not required.

"[T]he Special Assistant must have specific authority" from the Secretary of the Navy to sign and issue a letter of appointment. (Supp. Br. for Def.-Appellee at 3.) Although there is apparently no express delegation from the President to the Secretary of the Navy pursuant to 3 U.S.C. § 301 of the authority to appoint naval officers on behalf of the President, such an express delegation is not required for the letter to serve as the public act of appointment required by the Constitution. The statute provides:

> This chapter [3 U.S.C. § 301 *et seq.*] shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

3 U.S.C. § 302. We have previously held that, in view of section 302, the President need not expressly delegate authority. *See Law v. United States,* 11 F.3d 1061, 1067 (Fed. Cir. 1993) (holding that the Secretary of Transportation had properly removed a Coast Guard officer's name from a promotion list, even though such authority had not been expressly delegated by the President).

The Supreme Court has assumed that the authority to appoint military officers can be delegated. *See, e.g., Orloff v. Willoughby,* 345 U.S. 83, 90, 73 S. Ct. 534, 97 L. Ed. 842 (1953) ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the

President as Commander in Chief.... Petitioner, like every conscript, was inducted as a private. To obtain a change of that status requires appointment by *or under authority of* the President." (emphasis added)); *United States v. Moore*, 95 U.S. 760, 762, 24 L. Ed. 588 (1877) ("The place of passed assistant-surgeon is an office, and the *notification by the Secretary of the Navy was a valid appointment to it.*" (emphasis added)).

Our predecessor court addressed the issue more directly in *O'Shea v. United States*, 28 Ct. Cl. 392 (1893). In *O'Shea*, the Secretary of War informed O'Shea on November 21, 1887, "that the President of the United States has appointed you post chaplain in the service of the United States." *Id.* at 398. Nevertheless, another person was nominated for the position and appointed to fill the vacancy on March 5, 1888. *See id.* at 399. O'Shea claimed that he had been appointed to the position by the Secretary of War's letter, and sought pay for the position from November 24, 1887, to March 5, 1888. *See id.* The Court of Claims held that the Secretary of War's letter served as O'Shea's appointment:

> [O'Shea's] appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary [of War] (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made.

Id. at 401. As in *O'Shea*, the letter from the Special Assistant for Flag Officer Management and Distribution expressly states that the appointment is made by the President: "The President of the United States has appointed you to the grade of Rear Admiral (Upper Half) (O-8)." (Supp. Br. for Def.- Appellee at 2.) Thus, the signing and issuance of a letter of appointment is the final public act for a

naval officer to be promoted to rear admiral. The complaint in this case does not allege that a letter of appointment promoting the appellant to rear admiral was signed and issued, and there is no evidence that any such appointment letter was in fact signed and issued.

B

1

However, the appellant contends that he was automatically appointed to the grade of rear admiral by virtue of 10 U.S.C. § 624(a)(2). The statute provides:

> [O]fficers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed. Promotions *shall be made* in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

10 U.S.C. § 624(a)(2) (emphases added). Although section 624(a) refers to the "promotion" of an officer, section 624(b) provides that "[a] regular officer who is promoted under this section *is appointed* in the regular grade to which promoted." *Id.* § 624(b) (emphasis added). In addition, section 624(d) prescribes the procedure for delaying "the appointment of an officer under this section." *Id.* § 624(d). The appellant argues that, pursuant to section 624, his appointment was automatic once he was confirmed by the Senate and a rear admiral position became vacant while his name was at the top of the promotion list. However, the language of the statute does not provide for automatic appointment without action by the President. Rather, the statute provides that appointments are made "by the President, by and with the advice and consent of the Senate." *Id.* § 624(c); *see also*

U.S. Const. art. II, § 2, cl. 2.

Nor does the legislative history provide any reason here to believe that Congress intended the statute to provide for automatic appointments. Both the House and Senate reports focus on providing uniform promotion procedures for all branches of the armed forces. *See, e.g.*, H.R. Rep. No. 96-1462, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6334 (stating that the bill was meant to "[p]rovide uniform laws for promotion procedures for officers in the separate services"); S. Rep. No. 96-375, at 1 (1979) (stating that the bill was meant to "[p]rovide uniform laws governing officer promotions in each military service"). Neither report discusses an attempt to ensure that those officers placed on promotion lists would automatically be appointed as part of such a uniform statutory scheme. In addition, the House Report states that the bill was intended to "provide common general authority for the permanent appointment of officers *by the President* with the advice and consent of the Senate." H.R. Rep. No. 96-1462, at 36, *reprinted in* 1980 U.S.C.C.A.N. at 6367 (emphasis added). Therefore, the legislative history does not show that Congress intended to provide for automatic appointments.

In any event, Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic appointments. The limited role for Congress in the appointment process is specified in the Constitution itself, which provides only that Congress may vary the process for "inferior Officers." U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). Protecting the role of the President in the appointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention. *See*

Buckley v. Valeo, 424 U.S. 1, 128-31, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *see also Weiss,* 510 U.S. at 184-87, 114 S. Ct. 752 (Souter, J., concurring); *Freytag v. Comm'r of Internal Revenue,* 501 U.S. 868, 883-85, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991).

In *Buckley,* the Court considered the constitutionality of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1280-81, which provided for a Federal Election Commission composed of six voting members, two of whom were to be appointed by the President pro tempore of the Senate, and two of whom were to be appointed by the Speaker of the House of Representatives. *See Buckley,* 424 U.S. at 126, 96 S. Ct. 612. The Court held this provision unconstitutional because the members of the commission, who qualified as officers of the United States, were not appointed pursuant to the constitutional appointment process. *See id.* ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].").

Similarly, the Court in *Springer v. Philippine Islands,* 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845 (1928), considered Congress's attempt in the Organic Act, ch. 416, 39 Stat. 545 (1916), to create a government for the Philippine Islands in which the legislative branch had the power to "provide for the appointment and removal of the heads of the executive departments by the Governor General." *Springer,* 277 U.S. at 201, 48 S. Ct. 480 (quoting Organic Act, ch. 416, § 22, 39 Stat. 545, 553 (1916)). The Court held this provision unconstitutional, stating: "It may be stated ..., as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise ...

executive ... power." *Id.* The Court further ruled: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or *appoint the agents charged with the duty of such enforcement.* The latter are executive functions." *Id.* at 202, 48 S. Ct. 480 (emphasis added). The Court has consistently prohibited attempts by Congress to exercise the appointment power, which properly lies with the President, holding that, "while Congress may create an office, it cannot appoint the officer." *Weiss,* 510 U.S. at 174, 114 S. Ct. 752 (quoting *Shoemaker,* 147 U.S. at 300, 13 S. Ct. 361). Thus, military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute.[8]

2

Finally, even though the statute cannot provide for automatic appointments, we must consider whether the statute can be read as compelling appointment in accordance with the statutory scheme.

In general, the subject of military promotions is beyond the competence of courts to review. *See, e.g., Orloff,* 345 U.S. at 91, 73 S. Ct. 534; *Adkins v. United States,* 68 F.3d 1317, 1324 (Fed. Cir. 1995) ("Courts will not interject themselves into the promotion process."). However, the Military Pay Act, 37 U.S.C. § 204 (2000), provides for suit in the Court of Federal Claims when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay. *See, e.g., Holley v. United States,* 124 F.3d 1462, 1465 (Fed. Cir. 1997); *Sanders v. United States,* 219 Ct. Cl. 285,

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[8] Although Congress may permissibly change an officer's pay and direct that an officer be paid as though he had been appointed to a higher grade, it cannot change an officer's grade, which requires an appointment. *See Wood v. United States,* 107 U.S. (17 Otto) 414, 417, 18 Ct. Cl. 761, 2 S. Ct. 551, 27 L. Ed. 542 (1882).

594 F.2d 804, 810-11 (1979) (*en banc*). The Corrections Board statute, 10 U.S.C. § 1552, provides for correction of military records if a promotion has been improperly denied (and for the convening of special selection boards in appropriate cases to determine whether the officer should be promoted), and for judicial review of the Board's decision. *See Richey v. United States,* 322 F.3d 1317, 1323-25 (Fed. Cir. 2003); *Porter v. United States,* 163 F.3d 1304, 1311-12 (Fed. Cir. 1998); *Sanders,* 594 F.2d at 810- 11; *see also Adkins,* 68 F.3d at 1326; *Law,* 11 F.3d at 1064. Because the Military Pay Act is a money-mandating statute, the general rule "that one is not entitled to the benefit of a position until he has been duly appointed to it," *United States v. Testan,* 424 U.S. 392, 402, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976), is inapplicable.[9] In such cases, redress may be afforded for a promotion improperly denied. It is apparently assumed that the constitutionally-mandated steps in the appointment process--nomination, confirmation, and actual appointment--would be followed absent improper action by subordinate officials, and that the rare exercise of Presidential (or Senate) discretion not to make the appointment creates no Article III bar to the action in the Court of Federal Claims. *See Glidden Co. v. Zdanok,* 370 U.S. 530, 568-71, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 113-14, 68 S. Ct. 431, 92 L. Ed. 568 (1948).

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[9] *Testan* prohibited a claim for retroactive benefits pursuant to the Classification Act, 5 U.S.C. § 5101 *et seq.* (2000), which the Court held was not money-mandating, as is required for the Court of Federal Claims to take jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491 (2000). 424 U.S. at 399-400, 96 S. Ct. 948. The Court held that, because the Classification Act was not money-mandating, it did not alter the "established rule ... that one is not entitled to the benefit of a position until he has been duly appointed to it." *Id.* at 402, 96 S. Ct. 948. Unlike *Testan,* there is a money-mandating statute here--the Military Pay Act.

The appellant argues that the Secretary's action here, declining to follow the Board's decision recommending his promotion, is contrary to law. This case, however, is fundamentally different from the cases on which the appellant relies. The appointment was not derailed as a result of action by a subordinate official acting in his own authority, but by the President, who decided not to make the appointment. Such action by the President or an officer acting for the President is simply unreviewable. *See, e.g., Orloff,* 345 U.S. at 92, 73 S. Ct. 534; *Curry v. United States,* 221 Ct. Cl. 741, 609 F.2d 980, 983 (Ct. Cl.1979); *Cooper v. United States,* 203 Ct. Cl. 300, 303 (1973); *D'Arco v. United States,* 194 Ct. Cl. 811, 441 F.2d 1173, 1175 (1971).

The Constitution contemplates that, after confirmation, the President may refuse to execute the appointment. All Presidential appointments, particularly those to senior positions, involve a discretionary decision. What the Supreme Court has said with respect to appointments generally applies particularly in this context:

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

Keim v. United States, 177 U.S. 290, 293, 35 Ct. Cl. 628, 20 S. Ct. 574, 44 L. Ed. 774 (1900). Our predecessor court has specifically held that the President or an officer acting for him may remove an officer's name from a promotion list "at any time before the appointment is consummated." *D'Arco,* 441 F.2d at 1175. In *D'Arco,* the Secretary of the Navy,

acting for the President, removed D'Arco's name from a promotion list after he had been confirmed by the Senate. *Id.* at 1174. The Court of Claims upheld this action, holding that, in accordance with *Marbury,* the President (and the Secretary acting for the President) "could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission." *Id.* at 1175; *see also Doggett v. United States,* 207 Ct. Cl. 478, 482 (1975) ("We believe that in the absence of any contrary requirement, a power ... to recommend a promotion, implies a power to withdraw the recommendation *at any time before it is acted on.*" (emphasis added)).

The current statutory language itself does not clearly compel the President to appoint military officers. As the appellant notes, the statute provides that officers "*shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. § 624(a)(2) (emphasis added); *see also* S. Rep. No. 96-375, at 21 ("[A]fter confirmation by the Senate and unless a promotion is delayed for good reason, *promotions shall be made* to fill vacancies in order of seniority." (emphasis added)).

This language contrasts with the language of the previous statute, which provided that "[t]he President *may fill vacancies* in any grade in the line of the Regular Navy" in accordance with the statutory provisions. 10 U.S.C. § 5780 (1976) (repealed 1980) (emphasis added). Our predecessor court interpreted the previous statute's language in *D'Arco* as permitting the President to remove an officer's name from a promotion list "at any time before the appointment is consummated." 441 F.2d at 1175; *see also Doggett,* 207 Ct. Cl. at 482. In *D'Arco,* the court held that the provision that "[t]he President may terminate any temporary appointment," 10 U.S.C. § 5779 (1964) (repealed 1980), permitted the

President (or the Secretary acting for the President) to withhold a commission. 441 F.2d at 1175.

Although DOPMA changed the statutory language, there is no indication in the legislative history that Congress intended to cabin the President's authority or to overrule our predecessor court's decision in *D'Arco*. As noted above, the House Report states that the bill was intended to "provide common general authority for the permanent appointment of officers by the President with the advice and consent of the Senate." H.R. Rep. No. 96-1462, at 36 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6367. Indeed, the statute provides that "[t]he President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter." 10 U.S.C. § 629(a). In any event, Congress does not have the authority to require the President to exercise his appointment power; such authority would be akin to an exercise by Congress of the appointment power itself, which is prohibited.

Nor does the judiciary have a role in reviewing such decisions. The President's decision not to appoint is a discretionary act that cannot be reviewed by a court. *See, e.g., Marbury*, 5 U.S. (1 Cranch) at 165-67. In *Marbury*, the Court held that it could not review the President's exercise of his appointment power because it is discretionary: "The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion." *Id.* at 166-67. Similarly, the Court in *Dalton v. Specter*, 511 U.S. 462, 114 S. Ct. 1719, 128 L. Ed. 2d 497 (1994), held that it could not review the President's discretionary determination of which military bases to close pursuant to the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687, even if subordinate officials had failed to comply with legal requirements. *Id.* at 476-77, 114 S. Ct.

1719. The Court held: "Where a statute ... commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." *Id.* at 477, 114 S. Ct. 1719. The same is necessarily true where the President is afforded discretion by the Constitution itself. The President's decision here whether or not to exercise his appointment power is discretionary, and we hold that the President cannot be compelled to appoint military officers.

Therefore, the appellant was never appointed to the grade of rear admiral, and we cannot review the President's decision not to appoint him. Because he was never appointed, the appellant is not entitled to the pay and benefits he would have received if he had been promoted to that grade. We therefore affirm the Court of Federal Claims' denial of that relief.

II

Finally, the appellant contends that he is entitled to $15,000 of MASP because the pay was denied on the basis of Vice Admiral Koenig's improper fitness report. However, that issue is not justiciable. The Court of Federal Claims may only review a denial of MASP "for compliance with established procedures"; it may not review "the substantive merits of the decision." *Voge*, 844 F.2d at 779. In *Voge*, we held that "there are no tests or standards for the court to apply in determining whether the decision to terminate [M]ASP is correct. Instead, Congress provided only that the determination to deny [M]ASP may be made 'at any time' by the Secretary." *Id.* at 780 (quoting 37 U.S.C. § 302(c)(2)) (citations omitted). The appellant argues that Vice Admiral Koenig violated regulations in formulating the fitness report, but he does not contend that the Secretary violated established procedures in denying MASP. Therefore, the Court of Federal Claims correctly held that it could not review the Secretary's decision to deny the appellant's

request for MASP because the issue was not justiciable. Accordingly, the court's denial of the appellant's claim for MASP is affirmed.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED.

COSTS

No costs.

APPENDIX E

Evelyn L. LEWIS, Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 05-5155.

United States Court of Appeals,
Federal Circuit.

Aug. 14, 2006.

Before RADER, Circuit Judge, CLEVENGER, Senior Circuit Judge, and DYK, Circuit Judge.

DYK, Circuit Judge.

Dr. Evelyn Lewis ("Lewis") appeals the decision of the Court of Federal Claims denying relief from the Secretary of the Navy's decision to delay her promotion and subsequently to remove her name from a military promotion list. Lewis urges that she was promoted as a matter of law under 10 U.S.C. § 624, and also that the decision of the Board of Correction for Naval Records ("BCNR"), sustaining the Secretary's actions denying her promotion, was based on an incorrect interpretation of 10 U.S.C. § 1094(a)(1). We hold that Lewis' claim that she was promoted as a matter of law is barred by our decision in *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), and that the BCNR's decision

denying her request for a correction of her personnel record was based on a proper understanding of 10 U.S.C. § 1094(a)(1). We therefore affirm the decision of the Court of Federal Claims.

BACKGROUND

At all relevant times, Lewis was an active-duty Commander in the Navy Medical Corps, and held a "restricted" Oklahoma medical license that limited her practice of medicine to federal facilities. On April 21, 1999, the President nominated Lewis for promotion to the rank of Captain. On June 30, 1999, the Senate confirmed her nomination. However, she could not achieve the rank of captain without being appointed to the position by the President. *Dysart v. United States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004).

Prior to October 1, 1999, 10 U.S.C. § 1094 required all "health-care professionals" in the Department of Defense ("DoD") "provid[ing] health care independently as ... health-care professional[s]" to carry a "current license." 10 U.S.C. § 1094(a)(1) (1994). It defined "health-care professional" as "person[s] [including physicians] providing direct patient care." *Id.* at § 1094(d)(2). On October 1, 1999, a new sentence was added to section 1094(a)(1), which provided that "[i]n the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license...." 10 U.S.C. § 1094(a)(1) (2000).

In December 1999, the Navy Bureau of Medicine and Surgery directed Lewis to show cause as to whether she should be retained in the Navy, because she did not have an unrestricted medical license. On May 2, 2000, a Navy Board of Inquiry (BOI) conducted an investigation and found that

separation was not warranted because Lewis "ha[d] not committed substandard performance of duty as evidenced by a failure to maintain the required professional licensure to practice medicine." J.A. at 147. Nonetheless, on June 27, 2000, the Chief of Naval Personnel determined that Lewis "may not be professionally qualified for permanent promotion" because she lacked "a valid state medical license recognized by the Navy," and notified Lewis that her appointment would be delayed pending a final decision by the Secretary of the Navy. J.A. at 149.

On September 26, 2000, Lewis filed a complaint in the United States District Court for the District of Columbia asserting that the action delaying her promotion was arbitrary and capricious. In an August 15, 2001, decision the court granted the government's motion to dismiss, holding the claim was non-justiciable and Lewis had failed to exhaust administrative remedies before the BCNR. *See Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 57 (D.D.C.2001). Lewis appealed to the United States Court of Appeals for the District of Columbia Circuit on August 21, 2001.

Lewis' situation continued to evolve while her case was pending before the District of Columbia Circuit.

Section 624(a) of title 10, a provision of the Defense Officer Personnel Management Act ("DOPMA"), provides that "[e]xcept as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. § 624(a)(2) (2000). Section 624(d) provides that "[a]n officer's appointment may not be delayed... more than 18 months after the date on which such officer would otherwise have been appointed...." 10 U.S.C. § 624(d)(4) (2000). Under this provision, the last date to which Lewis'

appointment could be delayed was February 1, 2002. By this date, Lewis had neither been removed from the promotion list nor appointed.

On March 5, 2002, Lewis applied to the BCNR, seeking a determination that she had been promoted to the rank of Captain by operation of law.[1] On May 10, 2002, after the expiration of the 18-month period, the Secretary of the Navy finally removed Lewis' name from the promotion list. The BCNR denied Lewis' application for relief on February 10, 2003, holding that under Secretary of the Navy Instruction ("SECNAVINST") 1120.12A and the applicable DoD policy, "the Navy properly considered [Lewis] to be professionally unqualified for promotion without an unrestricted license...." J.A. at 254. On March 31, 2003, Lewis requested voluntary retirement from active duty, and the Secretary of the Navy granted her request effective January 1, 2004.

On April 30, 2003, the District of Columbia Circuit issued a decision remanding to the district court. In a per curiam order, the court advised Lewis to seek leave of the district court to amend her complaint to include a damages claim, and to transfer the case to the Court of Federal Claims. *See Lewis v. Rumsfeld*, No. 01-5296, 2003 WL 21018861 (D.C.Cir. Apr. 30, 2003). Lewis did so, and on June 2, 2003, the district court granted her motion. The case was transferred to the Court of Federal Claims.

In the Court of Federal Claims, Lewis alleged that she was promoted to the rank of Captain as a matter of law by

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[1] Section 1552 of title 10 gives the military secretaries power to correct military records using civilian boards. It provides that "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(2) (2000).

operation of section 624(d). She also contended that she was denied promotion based upon an erroneous interpretation of section 1094. She sought pay and allowances of a Captain from August 1, 2000, to December 31, 2003, and the retired pay of a Captain.

The government moved to dismiss, or in the alternative, for judgment on the administrative record. *Lewis v. United States*, 67 Fed. Cl. 158, 163 (2005). The Court of Federal Claims (Judge Susan G. Braden) held that it had jurisdiction over Lewis' claim under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), and the Military Pay Act, 37 U.S.C. § 204 (2000). *Id.* at 160-61. While recognizing that "the merits of a promotion determination are non-justiciable," the court held that Lewis' claim was justiciable because "the court can intervene ... to ensure that the [promotion] decision was made in a proper procedural manner." *Id.* at 160. However, the court held that under our decision in *Dysart v. United States*, 369 F.3d at 1311-14, the President has complete discretion whether to appoint military officers. *Lewis*, 67 Fed. Cl. at 163. Accordingly, the court granted the government's motion for judgment on the administrative record. *Id.*

The appellant timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal determinations of the Court of Federal Claims, such as a judgment on the administrative record, without deference. *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed. Cir. 2003).

The Tucker Act, 28 U.S.C. § 1491, authorizes actions for monetary relief against the United States to be brought in the

Court of Federal Claims, but does not itself provide a substantive cause of action absent a money-mandating statute. *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc). The relevant money-mandating statute in this case is the Military Pay Act, 37 U.S.C. § 204, which "provides for suit in the Court of Federal Claims when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay." *Dysart*, 369 F.3d at 1315; *see also, e.g., Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997). [2]

Here Lewis seeks military pay that was denied as a result of the Secretary's decision to delay Lewis' promotion and to remove Lewis' name from the promotion list.[3]

While resort to a correction board is not mandatory, *Martinez*, 333 F.3d at 1305, where, as here, a service member has elected to pursue relief before a corrections board, we have reviewed the board's decision to determine whether it is arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *Id.* at 1314; *see also, e.g., Chappell v. Wallace*, 462 U.S. 296, 303, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) ("Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence."); *Porter v. United States*, 163 F.3d 1304, 1312 (Fed. Cir. 1998); *Armstrong v. United States*, 205 Ct. Cl. 754, 761 (1974).

II

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[2] Retirement pay claims are brought under other money-mandating statutes. *See, e.g.*, 10 U.S.C. §§ 6323, 6333, 1370; *see also Sawyer v. United States*, 930 F.2d 1577 (Fed. Cir. 1991) (holding that the disability retirement pay statute, 10 U.S.C. § 1201, is money-mandating).

[3] The corrections board statute, 10 U.S.C. § 1552, is not a money-mandating statute that provides the basis for a Tucker Act suit. *Martinez*, 333 F.3d at 1315.

We have confronted decisions by the military concerning officer retention and promotion in a variety of contexts. In general, we have said that the questions of the fitness of an officer to serve on active duty, and in what capacity the officer should serve, are not for the courts to decide. *Fisher v. United States*, 402 F.3d 1167, 1180-81 (Fed. Cir. 2005) (en banc) (noting that the question of "who should be allowed to serve on active duty, and in what capacity" is generally nonjusticiable (citing *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995))); *see also Orloff v. Willoughby*, 345 U.S. 83, 91, 73 S. Ct. 534, 97 L. Ed. 842 (1953); *Dysart*, 369 F.3d at 1315; *Adkins*, 68 F.3d at 1324. In addition, the Constitution expressly provides that only the President has the authority to appoint an officer, and thus to take the final step in the promotion process. As such, in *Dysart v. United States*, we made clear that "the President's decision not to appoint is a discretionary act that cannot be reviewed by a court," 369 F.3d at 1317, and that Congress cannot provide for automatic appointments. *Id.* ("Congress does not have the authority to require the President to exercise his appointment power....").

However, the Constitution, statutes, and regulations can appropriately regulate the categories of persons who may be appointed to particular positions and the process by which those appointments are made. For example, Congress can restrain the President's authority to appoint particular classes of persons to officer positions or bar appointment unless particular procedures are followed. *See, e.g.*, 10 U.S.C. §§ 611-41 (2000); *see also* U.S. Const. art. II, § 2, cl. 2; *Dysart*, 369 F.3d at 1306-07. If an individual has a "clear cut legal entitlement" to a position, but subordinate officials in the government misinterpret the Constitution, statutes, or regulations, and improperly decline to recommend that individual for nomination or appointment, redress may be available in the courts. *Smith v. Sec'y of the Army*, 384 F.3d

1288, 1294-95 (Fed. Cir. 2004) (stating that an action for money arises under the Military Pay Act when an individual has a "clear-cut legal entitlement" to a promotion). Thus, the courts can review promotion decisions for violations the Constitution,[4] statutes,[5] or regulations.[6]

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[4] *See generally, e.g., Chappell*, 462 U.S. at 303, 103 S. Ct. 2362 (recognizing that enlisted men challenging denial of promotions based on unconstitutional discrimination can seek relief from the board under the correction board statute, and that "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence."); *Berkley v. United States*, 287 F.3d 1076, 1090-91 (Fed. Cir. 2002) (addressing claim that reduction-in-force violated officers' Fifth Amendment right to equal protection by taking into account racial and gender characteristics in selecting them for involuntary separation).

[5] *See, e.g., Richey v. United States*, 322 F.3d 1317, 1325-26 (Fed. Cir. 2003) (where discharge resulted from allegedly improper non-promotion decisions, court reviewed the military's promotion procedures for compliance with 10 U.S.C. § 628); *Porter*, 163 F.3d at 1311-12 (same); *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804, 814, 817 (1979) (where discharge resulted from improperly denied promotions, court concluded that the military had "violated both the spirit and letter of the statute [10 U.S.C. § 3442(c), 8442(c) (1976) (repealed 1980)] and regulations."); *Doyle v. United States*, 220 Ct. Cl. 285, 599 F.2d 984, 996 (1979) (holding that promotion decision violated statutory requirement governing composition of selection board); see also *Roth v. United States*, 378 F.3d 1371, 1385 (Fed. Cir. 2004) (noting that "the test[s] or standards against which this court measures the military's conduct [such as failure to promote] are inherent: they are the applicable statutes and regulations" (quoting *Adkins*, 68 F.3d at 1323)).

[6] *See, e.g., Roth*, 378 F.3d at 1386-87, 1393 (holding promotion decision was unlawful because "Officer Effectiveness Reports" were adversely affected by violation of Air Force Regulation 36-10; requiring Air Force to reevaluate promotion decision); *Evensen v. United States*, 228 Ct. Cl. 207, 654 F.2d 68 (1981) (holding that promotion decision violated regulatory requirement governing composition of selection board); *Sanders*, 594 F.2d at 817-18 (military's refusal to consider officer's eligibility for promotion based on properly corrected record violated a regulation requiring correction of an officer's record upon a showing of "probable material error or injustice.").

In such an action, the court cannot, of course, order the President or his delegate to make the appointment. *See Dysart*, 369 F.3d at 1317 ("[T]he President's decision ... whether or not to exercise his appointment power is discretionary, and ... the President cannot be compelled to appoint military officers."); *Law v. United States*, 11 F.3d 1061, 1065 (Fed. Cir. 1993) (stating that the courts are "without authority to grant [] promotion[s]").[7] The question becomes whether the officer by delegation is exercising Presidential discretion in declining to grant the appointment or whether the official is improperly construing the Constitution, a statute, or regulation directing appointments (in which case the action is reviewable).

The award of back pay for an appointment that was denied by a subordinate official, as a result of an improper construction of the Constitution, a statute, or a regulation, is permissible because "[i]t is ... assumed that the constitutionally-mandated steps in the appointment process-nomination, confirmation, and appointment-would be followed absent improper action by subordinate officials, and that the rare exercise of Presidential (or Senate) discretion not to make the appointment creates no Article III bar to the action in the Court of Federal Claims," for back pay. *Dysart*, 369 F.3d at 1315; *see Glidden Co. v. Zdanok*, 370 U.S. 530, 568-71, 82 S. Ct. 1459, 8 L. Ed. 2d 671

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[7] *See also Randall v. United States*, 95 F.3d 339, 348 (4th Cir. 1996) ("The district court would have no authority to order the Secretary of the Army to promote Plaintiff to Lieutenant Colonel."); *Adkins*, 68 F.3d at 1324 (an officer's "prayer that the Court of Federal Claims direct the Secretary to promote him to the rank of colonel plainly was a request for impermissible 'interfer[ence] with legitimate Army matters.'" (quoting *Orloff*, 345 U.S. at 94, 73 S. Ct. 534)); *Yee v. United States*, 206 Ct. Cl. 388, 512 F.2d 1383, 1388 (1975) (denying a request for a court-ordered promotion, observing that "[c]ourts generally are not in the 'promotion business'").

(1962); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14, 68 S. Ct. 431, 92 L. Ed. 568 (1948).[8]

A

Against this backdrop, we can quickly dispose of Lewis' contention that she was promoted by operation of law pursuant to 10 U.S.C. § 624(a)(2) on the theory that the language of 624(d) mandates automatic appointment when the 18-month statutory delay period expires. We addressed and rejected the same argument, with respect to the same statute, in *Dysart*. We held that "the language of [section 624] does not provide for automatic appointment...." 369 F.3d at 1313. We further held that the statute could not constitutionally provide for automatic appointment because "military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute." *Id.* at 1313, 1315.

While Lewis contends that *Dysart* was wrongly decided, it is, of course, binding on this panel. Further, Lewis' claim is not distinguishable from *Dysart*. It is of no consequence that the President himself removed Dysart's name from the list more than six months after the deadline referred to in 624(d)(4), whereas the Secretary removed Lewis' name acting as a delegate of the President.[9] The premise of Lewis'

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[8] *See also Law*, 11 F.3d at 1065 (holding that the court has the authority to *recognize* a promotion by awarding back pay); *cf. Wood v. United States*, 107 U.S. 414, 417, 18 Ct. Cl. 761, 2 S. Ct. 551, 27 L. Ed. 542 (1883) (holding that Congress may not change an officer's grade, which requires appointment, but may change an officer's pay and direct that the officer be paid as though he had been appointed to a higher grade).

[9] Just as the authority to appoint military officers can be delegated, *see, e.g., Orloff*, 345 US. at 90, 73 S. Ct. 534; *United States v. Moore*, 95 U.S. 760, 762, 24 L. Ed. 588 (1877); *Dysart* 1312, so too can the

argument is the same as Dysart's – that section 624 provides for automatic appointment. We rejected this premise in *Dysart*, and decline to revisit it now.

II

Lewis also claims that the BCNR erred in sustaining the Secretary's decision to deny her promotion. She contends that an incorrect interpretation of 10 U.S.C. § 1094 resulted in the denial of her promotion.[10] The DoD policy implemented by the Secretary is reflected in a policy memorandum that was issued by the Assistant Secretary of Defense for Health Administration ("ASD(HA)"). The memorandum provides:

> Any physician license in a licensure category that restricts the physician to practice in a federal facility or within some other confined limits does not comply with the requirement [of § 1094(a)(1)] for an "unrestricted license." Unless waived [under § 1094(a)(2)], *all physicians must have at least one current, unrestricted license*.... Effective October 1, 1999, a physician without a full-scope license may not provide health care as a physician, unless a waiver is granted under this policy.

J.A. at 140. In a later memorandum, the ASD(HA) explained that the licensing requirement applies to "[a]ll physicians in the DoD," including "health care personnel

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authority to decline to appoint officers. *D'Arco v. United States*, 194 Ct. Cl. 811, 441 F.2d 1173, 1175 (1971); *see also Dysart*, 369 F.3d at 1316.

[10] In addition to arguing that section 1094 does not bar her promotion, Lewis urges that the BCNR's reliance on SECNAVINST 1120.12A was erroneous because SECNAVINST 1120.12A provides no support for the licensing requirement. The question whether the BCNR properly relied on SECNAVINST 1120.12A is irrelevant, because the BCNR's decision was fully supported by section 1094(a) itself.

whose duties are entirely administrative in nature and do not involve the provision of patient care." J.A. at 142. Lewis contends that the DoD policy of requiring all physicians to carry an unrestricted license is inconsistent with section 1094.

Prior to October 1, 1999, section 1094 required all persons "provid[ing] health care independently as ... health-care professional[s]" to possess a "current license." Section 1094(e)(2) provided that "[t]he term 'health-care professional' means a physician, dentist, clinical psychologist, or nurse and any other person providing *direct patient care* as may be designated by the Secretary of Defense in regulations." 10 U.S.C. § 1094(e)(2) (emphasis added).

Before 1999 the statute did not include any special requirement applicable to physicians. 10 U.S.C. § 1094(a)(1) (1994). In October 1999, a second sentence was added to section 1094(a)(1) addressed specifically to physicians:

> In the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license that is not subject to limitation on the scope of practice ordinarily granted to other physicians for a similar specialty by the jurisdiction that granted the license.

10 U.S.C. § 1094(a)(1) (2000), as amended by Pub. L. 105-261, 112 Stat.2073.

Lewis points out that section 1094 only requires any "physician ... provid[ing] *health care as a physician*" to carry an unrestricted license. In Lewis' view, a physician only provides health care as a physician if he or she provides

direct patient care. Lewis bases this argument on the fact that a physician who does not provide direct patient care is not a "health care professional" within the meaning of the first sentence of 1094(a)(1) of the statute. However, it is irrelevant that such a physician providing indirect care may not meet the statutory definition of "health care professional" in the pre-1999 version of the statute. The question here is what is meant by the second sentence, and the operative terms do not require direct care. The definition of physician is "a person who is legally qualified to practice medicine," and the practice of "medicine" is the provision of health care. *Random House Webster's Unabridged Dictionary* at 1462 (2d ed. 1998).[11] "Healthcare" is defined as "the field concerned with the maintenance or restoration of the health of the body or mind." *Id.* at 882. Based on the language of the statute, a physician who provides indirect care "provide[s] health care as a physician" and is subject to the unrestricted licensing requirement. Lewis does not contend that her duties were unrelated to the provision of health care. Indeed, all of her assignments appear to have involved the provision of health care.[12]

This broader definition is confirmed by the history and structure of the statute. We must assume that the statute was amended in 1999 for a purpose. The evident purpose of the amendment was to impose special requirements for physicians not applicable to other health care professionals. The fact that "health care professionals" generally were not

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[11] *Id.* at 1194 (defining "medicine" as "the art or science of restoring or preserving health or due physical condition, as by means of drugs, surgical operations or appliances, or manipulations").

[12] For example, she served in various positions at the Uniformed Services University of the Health Sciences in Bethesda, Maryland, including Acting Vice President in the Office of Recruitment and Minority Affairs; Director, Family Practice Clerkship; Director, University Health Center; Vice Chair, Department of Family Medicine.

required to have a license unless they were providing "direct patient care" says nothing about the statute's special requirements for physicians. Indeed, the omission of the "direct patient care" language from the special provision applicable to physicians added by the 1999 amendment strongly suggests in and of itself that the license requirement for physicians went beyond direct patient care.

Our interpretation is reinforced by the policy memoranda issued by the Assistant Secretary of Defense for Health Administration to which we owe at least *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). The ASD(HA) is "the principal staff assistant and advisor to the ... Secretary and Deputy Secretary of Defense for all DoD health policies, programs, and activities" and is tasked with "effectively execut[ing] the Department's medical mission." 32 C.F.R. § 367.3 (2005). The ASD(HA)'s memorandum of January 9, 1999, set forth the DoD's view that section 1094(a)(1) requires that "all physicians must have at least one current unrestricted license...." J.A. at 140. The later memorandum acknowledged that "[p]hysicians in purely administrative positions are not unusual," but stated that "[t]he vast majority of these positions are predicated on the knowledge base and credentials unique to physicians," and thus reaffirmed that the licensing requirement applies to these physicians as well. J.A. at 142.

We therefore conclude that Lewis was not denied promotion based on an incorrect interpretation of section 1094.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED

COSTS

No costs.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

The relevant sections of DOPMA are codified at 10 U.S.C. §§ 611, 618, 624, 629, and 741, as follows:

§ 611. Convening of selection boards

(a) Whenever the needs of the service require, the Secretary of the military department concerned shall convene selection boards to recommend for promotion to the next higher permanent grade, under subchapter II of this chapter, officers on the active-duty list in each permanent grade from first lieutenant through brigadier general in the Army, Air Force, or Marine Corps and from lieutenant (junior grade) through rear admiral (lower half) in the Navy. The preceding sentence does not require the convening of a selection board in the case of officers in the permanent grade of first lieutenant or, in the case of the Navy, lieutenant (junior grade) when the Secretary concerned recommends for promotion to the next higher grade under section 624(a)(3) of this title all such officers whom the Secretary finds to be fully qualified for promotion.

(b) Whenever the needs of the service require, the Secretary of the military department concerned may convene selection boards to recommend officers for continuation on active duty under section 637 of this title or for early retirement under section 638 of this title.

(c) The convening of selection boards under subsections (a) and (b) shall be under regulations prescribed by the Secretary of Defense.

§ 618. Action on reports of selection boards

(a)(1) Upon receipt of the report of a selection board submitted to him under section 617(a) of this title, the Secretary of the military department concerned shall review the report to determine whether the board has acted contrary to law or regulation or to guidelines furnished the board under section 615(b) of this title. Following such review, unless the Secretary concerned makes a determination as described in paragraph (2), the Secretary shall submit the report as required by subsection (b) or (c), as appropriate.

(2) If, on the basis of a review of the report under paragraph (1), the Secretary of the military department concerned determines that the board acted contrary to law or regulation or to guidelines furnished the board under section 615(b) of this title, the Secretary shall return the report, together with a written explanation of the basis for such determination, to the board for further proceedings. Upon receipt of a report returned by the Secretary concerned under this paragraph, the selection board (or a subsequent selection board convened under section 611(a) of this title for the same grade and competitive category) shall conduct such proceedings as may be necessary in order to revise the report to be consistent with law, regulation, and such guidelines and shall resubmit the report, as revised, to the Secretary in accordance with section 617 of this title.

(b)(1) After completing the requirements of subsection (a), the Secretary concerned, in the case of the report of a selection board that considered officers who are serving, or have served, in joint duty assignments, shall submit the report to the Chairman of the Joint Chiefs of Staff.

(2) The Chairman, in accordance with guidelines furnished to the Chairman by the Secretary of Defense, shall review the report for the purpose of determining if--

(A) the selection board acted consistent with the guidelines of the Secretary of Defense under section 615(c) of this title to ensure that selection boards give appropriate consideration to the performance in joint duty assignments of officers who are serving, or have served, in such assignments; and

(B) the selection board otherwise gave appropriate consideration to the performance in joint duty assignments of officers who are serving, or have served, in such assignments.

(3) After reviewing the report, the Chairman shall return the report, with his determinations and comments, to the Secretary concerned.

(4) If the Chairman determines that the board acted contrary to the guidelines of the Secretary of Defense under section 615(c) of this title or otherwise failed to give appropriate consideration to the performance of officers in joint duty assignments, the Secretary concerned may--

(A) return the report, together with the Chairman's determinations and comments, to the selection board (or a subsequent selection board convened under section 611(a) of this title for the same grade and competitive category) for further proceedings in accordance with subsection (a);

(B) convene a special selection board in the manner provided for under section 628 of this title; or

(C) take other appropriate action to satisfy the concerns of the Chairman.

(5) If, after completion of all actions taken under paragraph (4), the Secretary concerned and the Chairman remain in disagreement with respect to the report of a selection board, the Secretary concerned shall indicate such disagreement, and the reasons for such disagreement, as part of his transmittal of the report of the selection board to the Secretary of Defense under subsection (c). Such transmittal shall include any comments submitted by the Chairman.

(c)(1) After his final review of the report of a selection board, the Secretary concerned shall submit the report, with his recommendations thereon, to the Secretary of Defense for transmittal to the President for his approval or disapproval. The Secretary of Defense shall, before transmitting the report of a selection board to the President, take appropriate action to resolve any disagreement between the Secretary concerned and the Chairman transmitted to him under subsection (b)(5). If the authority of the President under this paragraph to approve or disapprove the report of a selection board is delegated to the Secretary of Defense, it may not be redelegated except to an official in the Office of the Secretary of Defense.

(2) If the report of a selection board names an officer as having a record which indicates that the officer should be required to show cause for his retention on active duty, the Secretary concerned may provide for the review of the record of that officer as provided for under regulations prescribed under section 1181 of this title.

(d) The name of an officer recommended for promotion by a selection board may be removed from the report of the selection board only by the President.

(e)(1) The names of the officers recommended for promotion in the report of a selection board shall be disseminated to the armed force concerned as follows:

(A) In the case of officers recommended for promotion to a grade below brigadier general or rear admiral (lower half), such names may be disseminated upon, or at any time after, the transmittal of the report to the President.

(B) In the case of officers recommended for promotion to a grade above colonel or, in the case of the Navy, captain, such names may be disseminated upon, or at any time after, the approval of the report by the President.

(C) In the case of officers whose names have not been sooner disseminated, such names shall be promptly disseminated upon confirmation by the Senate.

(2) A list of names of officers disseminated under paragraph (1) may not include--

(A) any name removed by the President from the report of the selection board containing that name, if dissemination is under the authority of subparagraph (B) of such paragraph; or

(B) the name of any officer whose promotion the Senate failed to confirm, if dissemination is under the authority of subparagraph (C) of such paragraph.

(f) Except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may not be disclosed to any person not a member of the board.

(g) If the Secretary of a military department or the Secretary of Defense makes a recommendation under this section that the name of an officer be removed from a report of a selection board and the recommendation is accompanied by information that was not presented to that selection board, that information shall be made available to that officer. The officer shall then be afforded a reasonable opportunity to submit comments on that information to the officials making the recommendation and the officials reviewing the recommendation. If an eligible officer cannot be given access to such information because of its classification status, the officer shall, to the maximum extent practicable, be provided with an appropriate summary of the information.

§ 624. Promotions: how made

(a)(1) When the report of a selection board convened under section 611(a) of this title is approved by the President, the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a single list for that competitive category, to be known as a promotion list, in the order of the seniority of such officers on the active-duty list.

(2) Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed. Promotions shall be made in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted. Officers to be promoted to the grade of first lieutenant or lieutenant (junior grade) shall be promoted in accordance with regulations prescribed by the Secretary concerned.

(3)(A) Except as provided in subsection (d), officers on the active-duty list in the grade of first lieutenant or, in the case of the Navy, lieutenant (junior grade) who are on an approved all-fully-qualified-officers list shall be promoted to the next higher grade in accordance with regulations prescribed by the Secretary concerned.

(B) An all-fully-qualified-officers list shall be considered to be approved for purposes of subparagraph (A) when the list is approved by the President. When so approved, such a list shall be treated in the same manner as a promotion list under this chapter.

(C) The Secretary of a military department may make a recommendation to the President for approval of an all-fully-qualified-officers list only when the Secretary determines that all officers on the list are needed in the next higher grade to accomplish mission objectives.

(D) For purposes of this paragraph, an all-fully-qualified-officers list is a list of all officers on the active-duty list in a grade who the Secretary of the military department concerned determines--

(i) are fully qualified for promotion to the next higher grade; and

(ii) would be eligible for consideration for promotion to the next higher grade by a selection board convened under section 611(a) of this title upon the convening of such a board.

(b)(1) A regular officer who is promoted under this section is appointed in the regular grade to which promoted and a reserve officer who is promoted under this section is appointed in the reserve grade to which promoted.

(2) The date of rank of an officer appointed to a higher grade under this section is determined under section 741(d) of this title.

(c) Appointments under this section shall be made by the President, by and with the advice and consent of the Senate, except that appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(d)(1) Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if--

(A) sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of;

(B) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

(C) a board of officers has been convened under chapter 60 of this title to review the record of the officer; or

(D) a criminal proceeding in a Federal or State court is pending against the officer.

If no disciplinary action is taken against the officer, if the charges against the officer are withdrawn or dismissed, if the officer is not ordered removed from active duty by the Secretary concerned under chapter 60 of this title, or if the officer is acquitted of the charges brought against him, as the

case may be, then unless action to delay an appointment has also been taken under paragraph (2) the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(2) Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may also be delayed in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion. If the Secretary concerned later determines that the officer is qualified for promotion to such grade, the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and the officer shall, upon such promotion, have the same date of rank, the same effective date for pay and allowances in the higher grade to which appointed, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(3) The appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary.

(4) An appointment of an officer may not be delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay. An officer's appointment may not be delayed more than 90 days after final action has been taken in any criminal case against such officer in a Federal or State court, more than 90 days after final action has been taken in any court-martial case against such officer, or more than 18 months after the date on which such officer would otherwise have been appointed, whichever is later.

§ 629. Removal from a list of officers recommended for promotion

(a) The President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter.

(b) If, after consideration of a list of officers approved for promotion by the President, the Senate does not give its advice and consent to the appointment of an officer whose name is on the list, that officer's name shall be removed from the list.

(c)(1) An officer whose name is removed from a list under subsection (a) or (b) continues to be eligible for consideration for promotion. If he is recommended for promotion by the next selection board convened for his grade and competitive category and he is promoted, the Secretary of the military department concerned may, upon such promotion, grant him the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if his name had not been so removed.

(2) If such an officer who is in a grade below the grade of colonel or, in the case of the Navy, captain is not recommended for promotion by the next selection board convened for his grade and competitive category, or if his name is again removed from the list of officers recommended for promotion, or if the Senate again does not give its advice and consent to his promotion, he shall be considered for all purposes to have twice failed of selection for promotion.

§ 741. Rank: commissioned officers of the armed forces

(a) Among the grades listed below, the grades of general and admiral are equivalent and are senior to other grades and the grades of second lieutenant and ensign are equivalent and are junior to other grades. Intermediate grades rank in the order listed as follows:

Army, Air Force, and Marine Corps	Navy and Coast Guard
General	Admiral.
Lieutenant general	Vice admiral.
Major general	Rear admiral.
Brigadier general	Rear admiral (lower half).
Colonel	Captain.
Lieutenant colonel	Commander.
Major	Lieutenant commander.
Captain	Lieutenant.
First lieutenant	Lieutenant (junior grade).
Second lieutenant	Ensign.

(b) Rank among officers of the same grade or of equivalent grades is determined by comparing dates of rank. An officer whose date of rank is earlier than the date of rank of another officer of the same or equivalent grade is senior to that officer.

(c) Rank among officers of the Army, Navy, Air Force, and Marine Corps of the same grade or of equivalent grades who have the same date of rank is determined by regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

(d)(1) The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment shall be determined by the Secretary of the military department concerned at the time of such appointment. The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment and who at the time of such appointment was awarded service credit for prior commissioned service or constructive credit for advanced

education or training, or special experience shall be determined so as to reflect such prior commissioned service or constructive service. Determinations by the Secretary concerned under this paragraph shall be made under regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

(2) Except as otherwise provided by law, the date of rank of an officer who holds a grade as the result of a promotion is the date of his appointment to that grade.

(3) Under regulations prescribed by the Secretary of Defense, which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps, the date of rank of a reserve commissioned officer (other than a warrant officer) of the Army, Navy, Air Force, or Marine Corps who is to be placed on the active-duty list and who has not been on continuous active duty since his original appointment as a reserve commissioned officer in a grade above chief warrant officer, W-5, or who is transferred from an inactive status to an active status and placed on the active-duty list or the reserve active-status list may, effective on the date on which he is placed on the active-duty list or reserve active-status list, be changed by the Secretary concerned to a later date to reflect such officer's qualifications and experience. The authority to change the date of rank of a reserve officer who is placed on the active-duty list to a later date does not apply in the case of an officer who (A) has served continuously in the Selected Reserve of the Ready Reserve since the officer's last promotion, or (B) is placed on the active-duty list while on a promotion list as described in section 14317(b) of this title.

(4)(A) The Secretary concerned may adjust the date of rank of an officer appointed under section 624(a) of this title

to a higher grade that is not a general officer or flag officer grade if the appointment of that officer to that grade is delayed from the date on which (as determined by the Secretary) it would otherwise have been made by reason of unusual circumstances (as determined by the Secretary) that cause an unintended delay in--

(i) the processing or approval of the report of the selection board recommending the appointment of that officer to that grade; or

(ii) the processing or approval of the promotion list established on the basis of that report.

(B) The adjusted date of rank applicable to the grade of an officer under subparagraph (A) shall be consistent--

(i) with the officer's position on the promotion list for that grade and competitive category when additional officers in that grade and competitive category were needed; and

(ii) with compliance with the applicable authorized strengths for officers in that grade and competitive category.

(C) The adjusted date of rank applicable to the grade of an officer under subparagraph (A) shall be the effective date for--

(i) the officer's pay and allowances for that grade; and

(ii) the officer's position on the active-duty list.

(D) When under subparagraph (A) the Secretary concerned adjusts the date of rank of an officer in a grade to which the officer was appointed by and with the advice and consent of the Senate and the adjustment is to a date before the date of the advice and consent of the Senate to that

appointment, the Secretary shall promptly transmit to the Committee on Armed Services of the Senate a notification of that adjustment. Any such notification shall include the name of the officer and a discussion of the reasons for the adjustment of date of rank.

(E) Any adjustment in date of rank under this paragraph shall be made under regulations prescribed by the Secretary of Defense, which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps.

APPENDIX G

REGULATORY PROVISION INVOLVED

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, DC 20350-1000

SECNAVINST 1420.1A
NMPC-22
8 January 1991

SECNAV INSTRUCTION 1420.1A

From: Secretary of the Navy
To: All Ships and Stations

Subj: PROMOTION AND SELECTIVE EARLY RETIREMENT OF COMMISSIONED OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND MARINE CORPS

Ref: (a) Title 10 United States Code (NOTAL)
(b) DoD Directive 1320.12 of 3 Jun 87 (NOTAL)
(c) DoD Directive 1320.7 of 27 Jul 81 (NOTAL)
(d) SECNAVINIST 1427.2A
(e) SECNAVINST 1400.1A
(f) SECNAVINST 1920.7
(g) SECNAVINST 1401.3
(h) SECNAVINST 1920.6A
(i) SECNAVINST 1900.7F

1. **Purpose.** To revise policy and procedures for permanent promotion and selective early retirement of commissioned officers 0-2 and above, except limited duty officers on the active-duty lists of the Navy and Marine Corps in

compliance with references (a), (b), and (c). This instruction is a complete revision and should be reviewed in its entirety.

2. **Cancellation.** SECNAVINST 1420.1.

3. **Applicability**

a. This instruction applies to all commissioned officers, 0-2 and above, except limited duty officers on the active-duty lists of the Navy and Marine Corps, as defined by sections 620 and 641 of reference (a) and implemented in reference (d).

b. SECNAVINST 1412.6J governs promotion of officers on the active-duty lists of the Navy or Marine Corps in the grade of ensign or second lieutenant.

c. SECNAVINST 1412.8 (NOTAL) governs the promotion of limited duty officers on active duty in the Navy and chief warrant officers on active duty in the Navy.

d. SECNAVINST 1412.9A (NOTAL) governs the promotion and continuation of limited duty officers and warrant officers in the Regular Marine Corps and warrant officers in the Marine Corps Reserve.

e. SECNAVINST 1421.3G (NOTAL) governs temporary (SPOT) promotion of officers in the Navy to lieutenant commander.

4. **Policy.** Department of the Navy (DON) policy is to meet skill and experience requirements for officers in each grade and competitive category established in reference (e) by using a system of competitive selection boards.

a. The promotion system is based on five-year plans designed to meet the following objectives:

(1) Select numbers of officers to fill projected vacancies to meet authorized strength in each competitive category and grade for the first fiscal year of the plan.

(2) Ensure reasonable career opportunities in each competitive category.

(3) Attain and maintain an all Regular Force on the active-duty list in the grades of 0-4 and above.

(4) Maintain programmed requirements by grade in each competitive category over the latter 4 fiscal years of the plan while maintaining relatively similar career opportunities.

b. Boards of experienced officers will provide a collective judgment and opinion on the quality of officers eligible for promotion. Promotion boards will be administered to ensure careful consideration of all eligible officers.

5. **Annual Promotion Plan.** The Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) shall submit to the Secretary of the Navy (SECNAV), via the Judge Advocate General (JAG), annually, a five-year promotion plan. The plan must be submitted 45 days before the proposed convening date of the first promotion board of the fiscal year promotion cycle.

a. The plan will provide an estimate of the number of officers needed in each grade and competitive category to attain authorized strength; the number of officers estimated to be serving in each competitive category for each grade; the number of officers authorized to be on active duty on the

lat day of each fiscal year for each grade, including the controlled grades as established in section 523 of reference (a); and a recommended promotion opportunity and projected flow point for each grade and competitive category. The proposed plan will also show the number of officers to be placed in the promotion zone for each grade in each competitive category; the number of officers to be selected for each grade and competitive category to attain the proposed promotion opportunity, and any proposed below zone opportunity.

b. The plan will provide rationale, and analysis as necessary, to support proposed deviations from the flow points and opportunity guidelines in paragraph 11 or proposed below-zone opportunity exceeding 10 percent for grades 0-4 and above. Plans proposing below zone opportunity greater than 10 percent shall be accompanied by a request for the Secretary of Defenses (SECDEF) approval of such opportunity. By law, plans may not propose below zone opportunity greater than 15 percent.

c. The plan should identify any expected need for selective continuation of officers under reference (f) or selective early retirement under paragraph 24, to aid in meeting strength, opportunity, or promotion flow points. Selective early retirement and selective continuation plans will be submitted as soon after the annual plan as feasible.

6. **Eligibility for Consideration for Promotion**

a. Commissioned officers who are on the active-duty list of the Navy or Marine Corps and who meet prescribed service-in-grade requirements are eligible for consideration by active duty promotion selection boards, except as provided in paragraphs 6b, 6d, 7, 10c, 18b, and 19d.

b. As provided in section 619 of reference (a), active-duty list promotion selection boards may not consider an officer whose name is on a promotion list for the next higher grade.

c. Officers who enter on active duty and are on the active-duty list on the date the board convenes will be eligible for consideration for promotion under this instruction unless eligibility is deferred under paragraph 7.

d. Officers placed on the active-duty list after the date a board convenes are not eligible for consideration by that board.

e. In the Judge Advocate General's Corps and Chaplain Corps, normal promotion flow for newly appointed officers is impeded when officers who are granted sufficient entry grade credit to provide for initial appointment in the grade of lieutenant (junior grade) and are eligible for consideration, commence active duty after the annual lieutenant selection board convenes. To avoid this impediment, annual promotion plans will provide for two lieutenant selection boards for the Judge Advocate General's Corps and Chaplain Corps each year.

7. **Deferred Eligibility.** Deferment of eligibility is intended to provide officers who otherwise would have been in zone or above zone an opportunity to obtain active-duty experience, qualifications and significant evaluation before being considered by a promotion board. Officers whose promotion eligibility is deferred will be considered as officers in, above, or below the promotion zone, as appropriate, as if their eligibility had not been deferred. Eligibility will be deferred as follows:

a. **Marine Corps Officers.** The CMC may, with the officer's consent or at his or her request, at any time prior to

the convening of the first selection board to consider his or her records defer the officer's eligibility for consideration in zone or above zone for promotion up to one year from the date the officer entered on active duty and was subject to placement on the active-duty list. An officer's written request for deferment must be submitted to the Commandant of the Marine Corps, Headquarters United States Marine Corps, (MMPR-1), Washington DC 20380-0001. Requests must arrive no later than the convening of the selection board before which the officer would normally be eligible.

b. **Navy Officers.** Except for appointees in the Judge Advocate General's Corps and Chaplain Corps, appointees whose placement on the active-duty list would make them eligible for consideration by a promotion board within one year of entering on active duty and being subject to placement on the active-duty list, shall be informed that their eligibility for consideration for promotion will be deferred unless they specifically request consideration. The appointee may waive this deferment and request consideration for promotion, in writing, to Commander, Naval Military Personnel Command (COMNAVMILPERSCOM) (NMPC-22), Navy Department, Washington DC 20370-5220. The request must be received by NMPC-22 no later than the convening of the board. The Chief of Naval Personnel (CHNAVPERS) shall normally place such officers' records before the promotion board.

c. **Judge Advocate General's Corps and Chaplain Corps Officers.** Deferred eligibility is not automatic for Judge Advocate General's Corps and Chaplain Corps officers eligible for lieutenant boards under paragraph 6e. These officers may, however, request deferment before the first regularly scheduled promotion board which would normally consider them. The officers may request deferment, in writing, to COMNAVMILPERSCOM

(NMPC-22), Navy Department, Washington DC 20370-5220, to arrive no later than the convening of the board before which deferment is requested. The CHNAVPERS shall normally defer eligibility of officers who request it under this paragraph.

d. **Reinstatement.** An eligibility deferral, waived under paragraph 7a or 7b, will not be reinstated.

8. **Service-in-Grade.** In the annual promotion plan, SECNAV will prescribe, under Section 619 of reference (a), service-in-grade requirements for eligibility for consideration by promotion boards in each grade and competitive category.

9. **Promotion Zones.** In the annual promotion plan, SECNAV will establish promotion zones for each grade and competitive category. The limits of each zone will be indicated by the name, active-duty list precedence number and date of rank of the designated junior and senior officer in zone. Below-zone eligibility, if prescribed, will be indicated by the name, active-duty list precedence number and date of rank of the designated junior officer eligible for consideration in each competitive category. Officers in the same grade who are eligible for consideration for promotion to the next higher grade will be considered as officers either above zone, above zone not previously considered, in zone, or below the promotion zone for their competitive category as defined below:

a. **Above Zone.** Officers within a particular grade and competitive category who are eligible for promotion and are senior to the senior officer in the promotion zone.

b. **Above Zone, Not Previously Considered.** Officers in a grade below 0-6 senior to the senor officer in zone for their competitive category, but who have neither been removed

from a promotion list to that grade; nor failed of selection to the next higher grade by an active-duty board, are considered as officers in the promotion zone, and are referred to as above zone, not previously considered.

c. **In Zone.** Officers within a particular grade and competitive category who:

(1) Are senior to the officer designated as the junior officer in the promotion zone, and

(2) Have neither:

(a) Failed of selection (grades below 0-6) or not been recommended for promotion (grades 0-6 and 0-7); nor

(b) Been removed from a promotion list to that grade.

d. **Below Zone.** Officers within a particular grade and competitive category who are eligible for promotion and are junior to the junior officer in the promotion zone.

10. **Limitations on Eligibility.** In the annual promotion plan SECNAV may prescribe the following limitations on eligibility for promotion in a competitive category. The CNO and CMC will make recommendations in proposed promotion plans for exercising the following limitations:

a. Limit the number of officers to be considered by a promotion board from below the promotion zone to those officers determined to be exceptionally well qualified for promotion. When this authority is exercised, SECNAV will prescribe in the annual promotion plan and in each promotion board precept, as applicable, the criteria for

determining which officers from below the promotion zone are exceptionally well qualified for purposes of promotion.

b. Limit the officers considered for promotion to the grade of 0-7 to those officers determined to be exceptionally well qualified for promotion. When this authority is exercised, SECNAV will prescribe in the annual promotion plan and in each promotion board precept, as applicable, the criteria for determining which officers in the grade of 0-6 are exceptionally well qualified for promotion.

c. Exclude from consideration for promotion those officers whose established separation date is within 90 days after the convening date of a promotion board for which they would have otherwise been eligible. Modifications to established separation dates made on or after the date the board convenes will not change the eligibility status of such officers for consideration by the board.

11. **Promotion Flow Point and Opportunity.** Promotion zones will be established to meet the separate promotion requirements of each competitive category. This may result in different promotion flow points and opportunity among the competitive categories. Within a competitive category, promotion zones will be designed to provide relatively similar promotion opportunity over a period of five years.

a. Per reference (b), the following guidelines will normally be applied to promotion plans for each competitive category:

Promotion To Grade	Flow Point*	Variance
04	10 years	+-1 year
05	16 years	+-1 year
06	22 years	+-1 year

Promotion To Grade	Oppor-tunity	Variance
04	80 percent	+-10%
05	70 percent	+-10%
06	50 percent	+-10%

* Years of active commissioned service plus all entry grade credit.

b. Per reference (c), promotion flow point for the Medical Corps and Dental Corps will normally be six years service in grade based on date of rank.

c. Promotion flow point and opportunity for any competitive category may be temporarily set outside these guidelines when necessary to attain or to maintain the authorized grade strength. Proposals to deviate from the guidelines prescribed in paragraph 11a must provide supporting rationale and estimated time frame within which compliance with the guidelines will become possible. When deviations from the guidelines in paragraph 11b are needed to attain and maintain the authorized grade strength for the Medical Corps or Dental Corps, the CNO will provide a request for Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN M&RA)) submission to Assistant Secretary of Defense (Health Affairs) (ASD (HA)) and Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P)) including supporting analysis.

12. **Promotion Boards**

a. **Precept.** Promotion boards shall be convened by precept addressed to the president of the board and signed by SECNAV. The precept will include instructions governing the proceedings of the board and will appoint the president and members of the board. The board shall adhere to the instructions in the precept. The president of the board also will serve as a member of the board.

b. **Skill Guidance.** The precept will provide SECNAV guidance relating to the needs of the Navy or Marine Corps for officers with particular skills in each competitive category, and other information and guidelines as necessary to enable the board to perform its functions properly.

c. **Notice of Convening.** SECNAV will issue a notice of the convening of a promotion selection board at least 30 days before the board is convened. The notice will include: (1) the names, active-duty list precedence numbers and dates of rank, of the junior and senor officers in the promotion zone as of the date of notification; (2) the name, active-duty list precedence number and date of rank of the junior officer eligible as of the date of notification, if applicable; and (3) the date the board will convene. The notice will also inform eligible officers of their right to communicate with the selection board and of their responsibility to ensure their personnel records are substantially accurate and complete.

d. **Membership.** The membership of promotion boards shall be determined under section 612 of reference (a) as implemented in reference (g). The following subparagraphs, from paragraphs H1 and H2 of reference (b), govern membership conduct of board proceedings. CNO and CMC shall supply a copy of these two subparagraphs to each selection board member.

(1) **Board President.** The senior member of a selection board may be appointed president of the board and may perform such administrative duties in connection with the board proceedings as the SECNAV may prescribe. A board president has no authority to determine any matter that would constrain the board from recommending for promotion those officers best qualified to meet the needs of the service concerned as specified by SECNAV.

(2) **Participation of Board Members.** Any board member who believes that he or she cannot in good conscience perform his or her duties as a member of the board without prejudice or partiality has a duty to request relief by SECNAV from such duty. Such a request will be honored. Any board member who believes the integrity of the board's proceedings has been adversely affected by improper influence of superior military or civilian authority, misconduct of the board president or a member, or any other reason, has a duty to request relief from his or her obligation of nondisclosure from the Secretary or from the Secretary of Defense, and upon receiving it, to report the basis for his or her belief to that authority.

e. **Board Support.** CNO and CMC shall provide recorders to each selection board to keep the official record of the proceedings, projectionists to perform record presentation for the board and administrative support as required.

f. **Oath.** Each member of the selection board shall swear or affirm that he or she will perform his or her duties as a member of the board without prejudice or partiality, having in view both the special fitness of officers and the efficiency of his or her service. Each recorder and assistant recorder shall swear or affirm that he or she will keep a true record of

the proceedings of the board. Each member, recorder, assistant recorder, projectionist and support personnel shall swear or affirm that he or she will not disclose the proceedings or recommendations of the board except as authorized or required by SECNAV or higher authority.

g. **Information to be Furnished to Promotion Boards.** No person may direct that a particular officer be selected by a selection board or that a selection board fail to select a particular individual. Except as provided for in this paragraph, all information and guidance to promotion selection boards shall be provided by SECNAV and shall be in writing and made a part of the board record. The written instructions and guidance to a board will not include information regarding a particular officer, unless unusual circumstances exist that would preclude an officer's performance from being documented in the official record (e.g., sensitive classified mission, etc.). An audio or video recording is an acceptable means of communication with the board, so long as a written transcript is made a part of the board record. The following information shall be furnished to each promotion selection board at the time it is convened:

(1) Marine Corps precepts will specify the maximum number of officers in each grade and competitive category that the board may recommend for promotion.

(2) Navy precepts will specify the percentage of officers the board may recommend from the list of eligible officers. The CHNAVPERS will provide the maximum number of officers that may be recommended after the board convenes and a final number of eligible officers is determined as of the date the board convenes.

(3) The maximum number or percentage of officers in the promotion zone authorized to be promoted within a

competitive category may not be increased after the convening of a selection board without written approval of SECDEF.

(4) CHNAVPERS or CMC, acting for SECNAV, shall provide the names of all officers in each competitive category who are to be considered by the board based on the criteria specified in the annual promotion plan as of the date the board convenes.

(5) CHNAVPERS or CMC shall supply all pertinent records of each officer to be considered by the board. Such records shall include all documents, including fitness reports, that are essential for a fair and substantially accurate and complete portrayal of each officer's career as of the date the board convenes. Fitness reports, personal awards or other documents with ending dates after the convening date of the board will not be added to these records even if received while the board is in session. If the board requests information to amplify or clarify official records provided to the board, the board may request such information from SECNAV, via CNO or CMC, as appropriate. Information from outside an officer's official record may not be provided to a board if that information, under Service regulations, could not otherwise be included in the officer's official record without notice to the officer and an opportunity for the officer to comment on it.

(6) Only SECNAV may provide additional guidance to promotion selection boards. The written instructions, information, or guidance furnished to a selection board may not be modified, withdrawn, or supplemented after the board submits its report to SECNAV, under section 617 of reference (a); except as provided in paragraph 14e.

h. **Submission of Precepts.** CHNAVPERS and CMC will submit, not later than 10 days before the proposed convening date, a precept for each selection board to SECNAV, via JAG.

13. **Communication with Promotion Boards.** Officers eligible for consideration by a promotion board may communicate directly in writing with the board. The communication may call attention to any matter concerning the officer that the officer considers important. It may include, as attachments, correspondence from any other individual.

a. Correspondence not originated or endorsed by the eligible officer, including endorsements, or other letters written on behalf of that officer and forwarded under separate cover, is not acceptable and will be returned. Correspondence that contains classified information will not be accepted.

b. Officers who desire to communicate with a promotion board shall forward written communication to the appropriate board via COMNAVMILPERSCOM (NMPC-22) or CMC (MMPR-1) as appropriate, to arrive no later than the convening date of the selection board which is to consider his or her record. Correspondence received after a board is convened will be returned.

c. The selection board shall consider all correspondence which complies with the above requirements.

d. Except as provided by this paragraph, no person may furnish unsolicited information or opinion regarding officers to be considered by a selection board.

14. **Reports of Proceedings of Promotion Boards.** Each promotion board shall submit a report to SECNAV listing the names of the officers recommended for promotion.

a. The report shall be in writing, signed by each board member and the recorder, and shall certify that the board has complied with all instructions contained in the precept. The report shall also certify that the board has carefully considered the record of each officer whose name was furnished to it, and that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are fully qualified and the best qualified for promotion to meet the needs of the Navy or Marine Corps from among the officers whose names were furnished to the board.

b. Each report shall include the name of any officer considered by the board whose record, in the opinion of a majority of the members of the board, indicates that the officer should be required to show cause for his or her retention on active duty under reference (h), because of substandard performance of duty, misconduct, moral or professional dereliction, or because retention is not clearly consistent with the interests of national security.

c. The report shall be forwarded for approval by the SECDEF via first, CHNAVPERS (Navy boards); second CNO or CMC, as appropriate; third, the Judge Advocate General of the Navy (JAG) for legal review; and fourth, SECNAV. In addition, the report of a selection board that considered officers with service in joint duty assignments will be forwarded to the Chairman of the Joint Chiefs of Staff (CJCS) for review under section 618(b) of reference (a).

d. Except as authorized or required by law, the proceedings of a selection board may not be disclosed to any person not a member of the board.

e. If SECNAV determines that the board acted contrary to law, regulation or guidelines, the report will be returned to the board for further proceedings. The Secretary may modify, withdraw, or supplement instructions, information, or guidelines, as part of a written explanation to the board. Upon receipt of a report that has been returned by SECNAV, the board (or a subsequent board convened under this instruction for the same grade and competitive category) shall conduct proceedings as necessary to revise the report and shall resubmit the revised report to SECNAV, via first, CHNAVPERS (Navy boards); second, CNO or CMC as appropriate; third, JAG for legal review, and fourth, CJCS if necessary.

f. In routing the report of a board that considered officers for promotion to grades 0-4 through 0-8, SECNAV will submit to SECDEF a memorandum for the President forwarding to the Senate nomination lists of the names of the officers approved for promotion. CNO or CMC, as appropriate, shall prepare the memorandum.

g. When the approved report of a selection board identifies officers who should be required to show cause for retention on active duty under subparagraph 14b, and when directed by SECNAV, CHNAVPERS or CMC will initiate a Board of Inquiry required by reference (a) on all such officers.

h. SECNAV may recommend to SECDEF that the board report be approved or disapproved. SECDEF may approve or disapprove the report but may not remove the name of any officer recommended for promotion. Only the President may

remove the name of an officer recommended for promotion from the report of a selection board.

15. **Promotion List.** When a selection board report is approved by or on behalf of the President by SECDEF, CHNAVPERS, or CMC as appropriate shall place the names of all officers approved for promotion within a competitive category on a single list in order of seniority for that competitive category. This list will be known as a promotion list.

16. **Dissemination of Names.** Upon the President's formal nomination to the Senate for confirmation of officers selected for promotion to flag and general rank, the names of those officers shall be officially disseminated. Upon SECDEF's approval of a promotion board report, the names of the officers on the promotion list to 0-6 and below will be disseminated officially within the Department of the Navy. Dissemination will be by ALNAV message. CNO and CMC, as applicable, shall submit the proposed message.

a. CNO or CMC may propose to withhold from the ALNAV the names of officers in the following categories:

(1) Officers against whom sworn court-martial charges have been preferred, but not disposed of; or

(2) Officers with a criminal proceeding in a Federal State or local court pending; or

(3) Officers against whom an investigation is being conducted to determine whether disciplinary/administrative action of any kind should be initiated.

b. The name of any officer, other than those whose promotions the Senate failed to confirm, that was withheld

from an ALNAV under subparagraph 16a must be promptly disseminated within the Department of the Navy upon Senate confirmation.

17. **Removal from Promotion List**

a. SECNAV may remove the name of any officer from a promotion list to any grade below 0-7. CHNAVPERS or CMC, as appropriate, may submit requests for such action to SECNAV. In the case of officers on a promotion list for the grades 0-7 and above, CHNAVPERS or CMC, as appropriate, shall provide a request for removal action to the President via SECDEF to SECNAV for signature.

b. If, after consideration of a list of officers approved for promotion by SECDEF, the Senate does not give its advice and consent to the appointment of an officer whose name is on the list, that officer's name shall be removed from the promotion list.

c. If an officer's name is removed from the promotion list by Secretarial action, CNO or CMC, as appropriate, shall notify that officer in writing of his or her removal from the promotion list and the resulting effect on promotion status under paragraphs 18 and 19.

18. **Eligibility of Officers Removed from Promotion List**

a. An officer whose name is removed from a promotion list continues to be eligible for consideration for promotion. If an officer is recommended for promotion by the next selection board convened for that officer's grade and competitive category and the officer is promoted, SECNAV

may, upon such promotion, grant the officer the same date of rank, the same effective date for pay and allowances for the grade to which promoted, and the same position on the active-duty list as the officer would have had if the officer's name had not been removed from the first promotion list.

b. Except for limited duty officers, if a Regular officer or a Reserve officer show name was removed from a promotion list to the grade of 0-3 is not recommended for promotion by the next selection board convened for the officer's grade and competitive category, or if the officer's name is again removed from the list of officers recommended for promotion to the grade of 0-3, the officer shall be ineligible for further consideration for promotion.

19. **Failure of Selection for Promotion**

a. Officers in grades below 0-6 who are in or above the promotion zone and are considered but not selected for promotion will be considered to have failed of selection for promotion to the next higher grade.

b. If an officer in a grade below 0-6 whose name was removed from a promotion list is not recommended for promotion by the next promotion board convened for the officer's grade and competitive category, or if the officer's name is again removed from the list of officers recommended for promotion, or if the Senate again does not give its advice and consent to the officer's promotion, the officer shall be considered for all purposes to have twice failed of selection for promotion.

c. Except as provided in subparagraph 19d, officers who fail of selection for promotion remain eligible for consideration by subsequent promotion boards so long as they remain on the active-duty list. Two or more failures of

selection subjects an officer to involuntary separation or retirement under references (a) and (h).

d. Regular officers who are subject to discharge under subsection 631(a)(1) of reference (a) as implemented in reference (h) for having twice failed of selection for promotion to the grade 0-3 and Reserve officers who have twice failed of selection to the grade of 0-3, are not eligible for further consideration for promotion.

e. Officers in or above the promotion zone who are selected for promotion to grade of 0-6 or below but decline the appointment shall be considered to be above zone for subsequent promotion selection boards. Per reference (i), they will not be considered to have failed of selection for promotion for purposes of entitlement to separation pay under section 1174 of reference (a).

20. **Counseling for Officers Who Fail of Selection for Promotion.** CHNAVPERS and CMC shall provide, upon request, counseling for officers who fail of selection for promotion to grades 0-3 to 0-6. Counseling shall consist of reviewing the officer's record and indicating any factors that may account for not having been selected.

a. The counselor will be an officer experienced in officer personnel matters who is senior to and, when practicable, in the same competitive category as the officer requesting counseling. The counselor may not be an officer who served as a member, recorder, projectionist or technical assistant for a promotion board which failed to select the requesting officer for promotion.

b. Requests for counseling should be submitted to COMNAVMILPERSCOM (NMPC-4) or Headquarters, Marine Corps (MMOA), as appropriate.

21. **Promotion of Selectees.** Officers on a promotion list will be appointed as Regular officers or Reserve officers, as appropriate, in the next higher grade as additional officers are needed in each grade and competitive category.

a. Promotions will be made in the order in which the names of officers appear on the promotion list for each competitive category as vacancies become available, except for those officers whose promotion have been delayed. Promotion of officers from one competitive category will be effected regardless of the relative seniority of officers of the same grade in other competitive categories.

b. CMC and CNO shall prescribe monthly numbers, by competitive category and grade, of officers to be promoted and shall announce the names of those officers promoted from the approved promotion list within the monthly numbers authorized.

c. Authority to prescribe monthly numbers and announce promotions may be delegated but not below the level of CHNAVPERS or Deputy Chief of Staff (Manpower and Reserve Affairs) (DC/S (M&RA)).

22. **Effective Dates of Promotion.** Except as provided in paragraph 23 or as otherwise provided by law, the date of rank of an officer promoted to a higher grade under section 624 of reference (a) and this instruction is the date of appointment. Appointments will be considered accepted and effective on the date specified in the promotion ALNAV or ALMAR unless the officer concerned expressly declines the appointment within 60 days of the effective date.

23. **Delay of Promotion**

a. **Criteria for Promotion Delay.** CHNAVPERS or CMC, as appropriate, or a member's commanding officer, may delay the appointment of an officer selected for promotion. If the appointment is delayed, the delaying officer shall, as soon as practicable, forward the information required by paragraph 23b to SECNAV for ratification. Promotion may be delayed under this instruction if:

(1) Sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of.

(2) An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer.

(3) Processing for separation for cause has been initiated under reference (h).

(4) A criminal proceeding in a Federal or state court is pending against the officer.

(5) There is cause to believe that the officer is mentally, physically, morally, or professionally unqualified.

b. **Command Requests for Delay**

(1) Commanding officers who consider delay of an officer's promotion warranted and delay an officer's promotion, shall submit justification for the delay t SECNAV via, CHNAVPERS (NMPC-82) (copy to COMNAVMILPERSCOM (NMPC-22)), or CMC (MMPR-1) as appropriate, within 10 days of knowledge of the circumstances warranting the delay, or as soon thereafter as practicable.

(2) Each justification for delay to SECNAV must include the following documents:

(a) A copy of the notification to the officer and;

(b) A statement by the officer. If the officer declines to make a statement, the officer concerned shall submit a signed statement to that effect;

(c) Supporting rationale for delay from the officer's commanding officer based on his or her knowledge of the officer involved; and

(d) A recommendation by CH-NAVPERS or DC/S (M&RA), as appropriate.

c. **Notification of Grounds for Delay.** The promotion of an officer may be delayed only if the officer has been given written notice of the grounds for the delay before the effective date of the appointment, unless it is impractical to do so, in which case such written notice shall be given as soon as practicable.

d. **Limitations on Delay.** The promotion of an officer may not be delayed under this paragraph for more than six months after the date on which the officer would otherwise have been promoted, unless SECNAV specifies a further period of delay. The CHNAVPERS or CMC will submit timely requests, with supporting rationale for any extension of delay of promotion. An officer's promotion may not be delayed more than 90 days after final action has been taken in any criminal case against the officer in a Federal or state court, more than 90 days after final action has been taken in any court-martial against the officer, or more than 18 months

after the date on which the officer would otherwise have been promoted, whichever is later.

e. **Removal from the Promotion List.** If during a delay of promotion, it is determined that removal from the promotion list is appropriate, removal action under paragraph 17a may be initiated. Although removal action is contemplated, requests for delay extensions as provided in paragraph 23d shall be submitted to SECNAV as necessary until the officer's name is removed from the promotion list.

f. **Subsequent Promotion.**

(1) If a promotion has been delayed under paragraph 23a(l)-23a(4) and no action has been taken to delay an appointment under paragraph 23a(5); and

(a) no disciplinary action is taken against the officer, charges against the officer are withdrawn or dismissed.

(b) the officer is not ordered administratively separated under reference (h); or

(c) the officer is acquitted of the charges brought against him or her, the officer shall be retained on the promotion list and shall. upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted and the same position on the active-duty list as he or she would have had if no delay had occurred, except as provided below.

(2) If SECNAV determines that the officer was unqualified for promotion for any part of the delay, the date of rank, effective date of pay and allowances, and position on the active-duty list may be adjusted. Officers whose

promotions were delayed under paragraph 23a(5) whom SECNAV later determines are qualified, shall be promoted in the same manner.

24. **Selective Early Retirement.** Regular officers on the active-duty lists in pay grades 0-5 through 0-8 may be selected for involuntary retirement prior to mandatory retirement dates determined under Section 633. 634, 635, or 636 of reference (a). SECNAV may convene a selective early retirement selection board, based on the recommendations and supporting rationale of CNO or CMC.

a. **Uses of Selective Early Retirement.** Early retirement will be used primarily during periods of officer strength reduction as a means to reduce he numbers of senior officers commensurate with reductions in other grades or to manage an officer grade imbalance or strength overage within a competitive category. It may not be used for the sole purpose of enhancing promotion opportunity; nor may it be used as a substitute for the disposition of commissioned officers who would otherwise be processed for administrative separation under reference (h).

b. **Eligibility for Selective Early Retirement**

(1) A Regular officer on the active-duty list in the Navy and Marine Corps may be considered for early retirement as follows:

(a) **Grade 0-5.** Officers who failed of selection for promotion to 0-6 two or more times whose names are not on a selection board report.

(b) **Grade 0-6.** Officers with four or more years of active service in grade whose names are not on a selection board report.

(c) **Grade 0-7.** Officers with three and one-half or more years of active service in grade whose names are not on a selection board report.

(d) **Grade 0-8.** Officers with three and one-half or more years of active service in grade.

(2) Not more than a fixed number or percentage, as prescribed by SECNAV, of the officers in each grade and competitive category who considered for selective early retirement may be selected by the board. The number or percentage prescribed by SECNAV for each grade and competitive category may not exceed 30 percent of the total number of officers considered in the particular grade and competitive category.

(3) The list of officers provided to a board for consideration for selective early retirement shall include each officer on the active-duty list in the same grade and competitive category whose position on the active-duty list is between that of the most junior officer in that grade and competitive category whose name is provided and that of the most senior officer in that grade and competitive category whose name is provided to the board who meet the criteria of subparagraph 24b(l). Except, officers serving in permanent grades 0-5 and 0-6 may not be considered for selective early retirement more than once in any 5-year period while in the same grade.

c. **Retirement Boards.** A separate board will be convened by precept signed by SECNAV for each grade and competitive category designated for selective early retirement. Boards shall be composed and sworn in the same manner as promotion selection boards under paragraph 12.

Promotion selection boards may be reconvened as selective early retirement boards.

d. **Information to be Furnished to the Board**

(1) SECNAV will furnish the following information to each board at the time it is convened:

(a) A list of names of officers to be considered for early retirement.

(b) Information on the skill needs and qualifications for the grade and competitive category.

(2) CHNAVPERS and the CMC shall provide the pertinent records of officers to be considered for early retirement.

e. **Reports.** Each board shall submit a written report to SECNAV listing the names of the officers recommended for retirement.

(1) The report of each selective early retirement board shall certify that the board has carefully considered the record of each officer whose name was furnished and that, based upon the identified needs of the service for officers serving in the grade and competitive category concerned, it is the opinion of a majority of the members that the early retirement of the officers whose names are listed in the selection board report is in the best interest of the Navy or Marine Corps, as appropriate.

(2) The report shall be forwarded for approval by SECNAV via first, CHNAVPERS (Navy boards); second, CNO or CMC; and third, JAG for legal review.

f. **Retirement**

(1) A Regular officer of the Navy or Marine Corps in the permanent grade 0-5 or 0-6 who is recommended for selective early retirement and whose early retirement is approved by SECNAV shall, on the date requested by the officer and approved by SECNAV. be retired under any provision of law under which the officer is eligible to retire. The retirement date of such officer shall not be later than the first day of the seventh calendar month beginning after the month in which SECNAV approved the report of the selective early retirement board.

(2) A Regular officer of the Navy or Marine Corps in the permanent grade of 0-7 or 0-8 who is recommended for early retirement and whose early retirement is approved by SECNAV shall, on the date requested by the officer and approved by SECNAV be retired under any provision of law under which the officer is eligible to retire. The retirement date of such officer shall not be later than the first day of the tenth calendar month beginning after the month in which SECNAV approved the report of the selective early retirement board.

(3) If the officer is nor eligible for retirement under any provision of law, the officer shall be retained on active duty until he or she is qualified for retirement under section 6323 of reference (a), and then be retired under that section, unless sooner discharged or retired under another provision of law.

(4) The early retirement of an officer under the provisions of this instruction is considered an involuntary retirement for purposes of any other provision of law.

25. **Establishing Authorized Strength for Promotion Planning and Execution**

a. CNO and CMC will submit to SECNAV annually a five-year officer promotion plan for each grade and competitive category as outlined in paragraph 5.

b. Proposed promotion plans are to be for the current and projected authorized strength requirements established under paragraph 25a. Promotion plans will be submitted not later than 45 days prior to the proposed convening date of the first applicable selection board.

c. The CNO and CMC shall submit any significant changes to the promotion plan in any grade or competitive category required by events occurring after the plan has been approved.

d. At the completion of a fiscal year's promotion cycle, CHNAVPERS and CMC will provide for submission to the Assistant Secretary of Defense (FM&P). the Defense Officer Promotion Report (DOPR)(Report Control Symbol DD-FM&P(A) (1621)) as prescribed in reference (b).

26. **Responsibility**

a. The Assistant Secretary of the Navy (Manpower and Reserve Affairs) is responsible for management oversight of the Promotion and Selective Early Retirement systems.

b. The CNO and CMC are responsible for promotion and selective early retirement planning and execution to meet the policy objectives of this instruction.

27. Reports. Board reports are exempt from reports control by SECNAVINST 5214.2B.

H. LAWRENCE GARRETT, III
Secretary of the Navy

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No. 06-1466

In the Supreme Court of the United States

DANNY T. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are promoted, including a requirement that military appointments be made by the President, but it does not specify what happens when those procedures are not followed. The questions presented are:

1. Whether the court of appeals correctly concluded that petitioner received timely notice of his promotion delay as required by DOPMA.

2. If not, whether the failure to follow DOPMA's procedures results in automatic appointment, by operation of law, of the affected officer to the next higher rank.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 473 F.3d 1356. The opinions of the Court of Federal Claims (Pet. App. 14a-40a, 41a-81a) are reported at 66 Fed. Cl. 497 and 57 Fed. Cl. 204, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2007. On March 26, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are promoted.[1] The promotion process is initiated by the Secretary of a military department, who, in response to departmental needs, "convene[s] selection boards to recommend for promotion [certain military officers] to the next higher permanent grade." 10 U.S.C. 611(a). After completing its prescribed tasks, each selection board "submit[s] to the Secretary of the military department concerned a written report * * * containing a list of the names of the officers it recommends for promotion." 10 U.S.C. 617(a). The Secretary of the military department concerned then reviews the report and ultimately submits it, "with his recommendations thereon, to the Secretary of Defense for transmittal to the President for his approval or disapproval." 10 U.S.C. 618(a)-(c). The President has the authority to remove the name of a recommended officer from a selection board's report. 10 U.S.C. 618(d).

After the President has approved the selection board's report and thereby nominated the named officers for a promotion, "the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of the seniority of such officers on the active-duty list." 10 U.S.C. 624(a)(1). That list is used to determine the named officers' promotion dates, which are ultimately set by the Secretary concerned under Sections 624(b)(2) and

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[1] Unless otherwise noted, references to DOPMA are to the 1994 version of that Act.

741(d). 10 U.S.C. 624(b); 10 U.S.C. 741(d) (1994 & Supp. II 1996). The statute provides: "Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed," in the order in which the officers' names appear on the list. 10 U.S.C. 624(a)(2).

Subsection (d) of Section 624 authorizes the Secretary of the military department concerned to issue regulations delaying the date of an officer's promotion beyond the date on which the officer would otherwise have been promoted (*i.e.*, beyond the date on which the officer would have been selected for promotion from the promotion list). See 10 U.S.C. 624(d).[2] Most relevant here, Section 624(d)(2) authorizes the Secretary concerned to delay the promotion of an officer when "there is cause to believe that the officer is * * * morally[] or professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. 624(d)(2). A promotion "may not be delayed," however, "unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." 10 U.S.C. 624(d)(3).[3] Further,

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[2] See SECNAV Instruction 1420.1A para. 23 (Jan. 8, 1991) (Pet. App. 158a-162a). Instruction 1420.1A was cancelled when the Secretary of the Navy issued SECNAV Instruction 1420.1B (Mar. 28, 2006) (which contains similar pertinent provisions). See *id.* para. 23.

[3] Section 624(d)(3) provides:

> The appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case

the promotion "may not be delayed * * * for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." 10 U.S.C. 624(d)(4). The statute does not specify a consequence for failure to provide timely notice or for an unspecified delay beyond six months.

After the President has nominated the named officers (by approving the selection board's report), he forwards the nominations to the Senate, as required by Section 624(c), which mandates that appointments under DOPMA "shall be made by the President, by and with the advice and consent of the Senate." 10 U.S.C. 624(c). The name of any officer not confirmed by the Senate is removed from the list. 10 U.S.C. 629(b).

Once an officer has been nominated by the President and confirmed by the Senate, the officer must still be appointed by the President. See 10 U.S.C. 624(c); see also 10 U.S.C. 629(a). Appointment generally occurs through the issuance of a letter signed by or for the President to each appointee, along with a certificate of appointment. See *Dysart* v. *United States*, 369 F.3d 1303, 1308 (Fed. Cir. 2004). Under Section 626(a), an "officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. 626(a). The relevant Secretary determines the

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such written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secre tary concerned in response to the action taken. Any such state ment shall be given careful consideration by the Secretary.

10 U.S.C. 624(d)(3).

date of the appointment, pursuant to Sections 624(b)(2) and 741(d). See 10 U.S.C. 624(b)(2); 10 U.S.C. 741(d) (1994 & Supp. II 1996).

2. Petitioner enlisted in the United States Navy (Navy) in 1983 and was promoted to lieutenant in 1992. Pet. App. 15a. On October 29, 1997, the petitioner's nomination for promotion to the rank of lieutenant commander was submitted to the Senate. *Ibid.* Petitioner's projected promotion date was April 1, 1998. *Id.* at 42a. The Senate confirmed petitioner's nomination on November 8, 1997. *Id.* at 15a.

Subsequent to his confirmation but before his projected promotion date, petitioner was disciplined by his commanding officer "for attempting to arrange off-duty liaisons with five enlisted women, two of whom were his subordinates." Pet. App. 4a; *id.* at 56a-57a. On February 19, 1998, because of this "conduct unbecoming an officer," a formal objection to petitioner's promotion was made. A letter dated March 17, 1998—approximately two weeks before petitioner's projected promotion date—was sent to petitioner notifying him that his promotion was being delayed "until all related administrative or disciplinary action [was] completed." *Id.* at 4a, 56a-57a. This notification letter was sent to petitioner's base in Misawa, Japan, but when it arrived there, petitioner was aboard the U.S.S. *John S. McCain* in the Persian Gulf. *Id.* at 4a. Because petitioner was to be returned to the base as soon as possible, the executive officer at the base decided not to forward the letter to the ship; it was given to petitioner on April 21, 1998, upon his return to the base. *Id.* at 67a.[4]

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[4] In addition, petitioner acknowledges receiving email notification of his promotion delay on April 15, 1998. Pet. App. 4a n.2.

On May 26, 1998, a Board of Inquiry (BOI) was convened to determine if petitioner should be released from the Navy because of his misconduct and conducted a two-day hearing. Pet. App. 4a. On May 27, 1998, BOI found that petitioner had "engaged in conduct unbecoming an officer, failed to demonstrate acceptable qualities of leadership, and failed to conform to prescribed standards of military deportment." *Ibid.* Nonetheless, by a vote of two to one, the BOI recommended that the Navy retain petitioner. *Ibid.* The BOI did not have the authority to decide—and expressed no view on—whether petitioner should be promoted. *Id.* at 4a, 51a. See also SECNAVINST 1920.6A CH-2, Administrative Board Procedures (encl. (8), paras. 2a, 2k (Mar. 17, 1993).

On August 24, 1998—five months and one week after the March 17, 1998, delay of petitioner's promotion—an Assistant Secretary of the Navy ratified and extended the delay pursuant to 10 U.S.C. 624(d)(4) until all related administrative actions were completed. Pet. App. 4a-5a, 11a. On April 26, 1999, the Secretary of the Navy approved the removal of petitioner's name from the promotion list after the Chief of Naval Personnel determined that petitioner was not qualified for promotion to lieutenant commander under the criteria set forth in 10 U.S.C. 624(d)(2). Pet. App. 5a. Pursuant to 10 U.S.C. 629(c)(2), the removal of petitioner's name was deemed a nonselection for promotion. Pet. App. 5a. On March 1, 2001, after being subsequently nonselected for the same promotion, petitioner was involuntarily discharged pursuant to 10 U.S.C. 632(a). Pet. App. 5a.

3. On October 21, 1999, petitioner filed this action in the Court of Federal Claims. Pet. App. 5a. He then filed an application for relief with the Board for Correction of Naval Records (BCNR) on May 16, 2000, assert-

ing that he had been automatically promoted by operation of law under Section 624(a)(2) because the Navy had not complied with the procedures required for a valid delay of his promotion. *Id.* at 16a, 51a. The BCNR denied relief, and petitioner pursued his case in the Court of Federal Claims, alleging that the delay of his promotion and the removal of his name from the promotion list were not in accordance with statutory and regulatory requirements, and that he had therefore been automatically promoted by operation of law on his projected promotion date. *Id.* at 5a-6a & n.3. Petitioner further alleged that the failure of the BCNR to grant him relief was contrary to law or arbitrary and capricious. *Id.* at 6a.

The Court of Federal Claims initially held that the delay in petitioner's promotion was improper and that petitioner had been promoted by operation of law. Pet. App. 75a-76a. More specifically, it held that none of the conditions for delay in 10 U.S.C. 624(d)(1) or (2) existed and that, even if there had been a proper cause for delay, the delay expired on May 27, 1998, when the BOI procedure was completed—an event that, according to the court, marked the completion of "all administrative or disciplinary action." Pet. App. 63a-64a. In light of that holding and "because determining when giving notice was practical in the military may impinge more on merits and timing decisions vice procedural determinations," the trial court deemed it "not necessary to resolve" whether the Navy had complied with Section 624(d)(3)'s written notice requirement. *Id.* at 68a.

The Court of Federal Claims subsequently vacated (Pet. App. 18a-19a) its initial ruling, following the Federal Circuit's holding in *Dysart* v. *United States*, 369 F.3d 1303 (2004), that DOPMA does not—and constitu-

tionally cannot—provide for automatic appointment by operation of law. The court, however, again ruled in petitioner's favor, holding that there were no statutory grounds for delaying petitioner's promotion, and that even if there were, the delay had expired at the conclusion of the BOI proceeding. Pet. App. 31a-32a, 38a-39a.

4. A unanimous panel of the Federal Circuit reversed. Pet. App. 1a-13a. It held that "the Navy complied with all relevant statutory and regulatory procedures" (*id.* at 9a) in delaying petitioner's promotion and that because there was no procedural error, the removal of petitioner's name from the promotion list was lawful. *Id.* at 9a-12a. Most relevant here, the Federal Circuit found that the Navy complied with Section 624(d)(3)'s notice requirement because providing written notice to petitioner while he was "at sea" was "impracticable." *Id.* at 11a. In the alternative, the court concluded that any failure to provide timely notice here was "harmless" because petitioner "did not suffer any prejudice," given that "he promptly submitted his written response as soon as he returned to Japan" and the "Navy neither took action against him nor made any decision to do so" until it received his response. *Ibid.* In light of that holding, the court did not reach the government's alternative argument that, if petitioner's promotion had not been validly delayed, *Dysart* nevertheless precluded his being automatically promoted in the absence of Presidential appointment. *Id.* at 12a.

ARGUMENT

Petitioner does not challenge the court of appeals' holding (Pet. App. 10a-11a) that his "conduct unbecoming an officer" constituted a valid ground under 10 U.S.C. 624(d) both for the Navy's initial delay of his pro-

motion and for the extension of that delay pending the Navy's determination of whether to remove his name from the promotion list. Instead, petitioner argues that the Navy violated DOPMA by failing to provide him with timely notice of the delay of his promotion (Pet. 24-27), and that he therefore was automatically promoted, by operation of law, on his projected promotion date (Pet. 19-24), despite the fact that his misconduct constitutes an appropriate basis for the delay and for the ultimate denial of his promotion.

The Federal Circuit's unanimous decision that the Navy provided petitioner with timely notice of the delay in his promotion is correct and that fact-specific determination does not warrant this Court's review. Because resolution of that factbound question is necessarily antecedent to the question whether DOPMA provides for automatic appointment in the absence of timely notification, this case is not a suitable vehicle for addressing the broader constitutional and statutory questions raised by petitioner. Indeed, the Federal Circuit declined to reach those issues in this case. Moreover, as explained in the government's opposition in *Lewis* v. *United States*, petition for cert. pending, No. 06-1289 (filed Mar. 23, 2007), and restated here (pp. 13-18, *infra*), petitioner's argument is without merit and does not warrant review in this Court.

1. The Federal Circuit correctly held that petitioner received timely notice of the grounds for the delay of his promotion as required by 10 U.S.C. 624(d)(3). Section 624(d)(3) states that an officer's promotion "may not be delayed * * * unless the officer has been given written notice of the grounds for the delay, *unless it is impracticable to give such written notice before the effective date of the appointment*, in which case such written no-

tice shall be given as soon as practicable." 10 U.S.C. 624(d)(3) (emphasis added).

Here, on March 17, 1998, fifteen days before petitioner's projected promotion date, the Chief of Naval Personnel sent written notice to inform petitioner that, because of his misconduct, his promotion was being delayed. Pet. App. 56a. The notice was addressed to petitioner and sent to his commanding officer at the base where petitioner was stationed in Japan. *Id.* at 56a, 67a. When the letter arrived, petitioner was aboard the U.S.S. *John S. McCain* in the Persian Gulf. *Id.* at 4a, 67a. Because petitioner was to be returned to the base "as soon as possible," the executive officer at the base decided not to forward the written notice to the ship "because it may not have arrived until after [petitioner] had already departed from the ship." *Id.* at 67a. The notice was given to petitioner on April 21, 1998, upon his return to the base. *Ibid.*

Petitioner contends (Pet. 11, 25) that providing him with written notice while at sea was not impracticable because he was reachable aboard the U.S.S. *John S. McCain* via email, fax, telephone, and electronic message. Petitioner's argument is based largely on his contention that "impracticable" means "impossible." Pet. 26. But an action need not be impossible to be impracticable; instead, it must simply be infeasible. See *Webster's Third New International Dictionary* 1136 (1961) ("not practicable: incapable of being performed or accomplished by the means employed or at command: infeasible"). And, in this context, the military's judgment about what is impracticable, especially in the context of persons serving on active duty, should be given deference by the courts. Cf. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2791-2792 n.51 (2006); *id.* at 2801(Kennedy, J.,

concurring in part) (explaining that "practicability judgments are entitled to some deference," and that the statutory language there—"insofar as is practicable"—"is best understood to allow the selection of procedures based on logistical constraints" and other practical considerations).

Here, the court of appeals correctly sustained the executive officer's determination that it was impracticable to forward the written notice of delay to the ship and ensure that it arrived before petitioner departed for the base. Pet. App. 11a. Further, the written notice was given to petitioner as soon as practicable—*i.e.*, upon his return to his base. Thus, the Federal Circuit correctly concluded that the Navy complied with Section 624(d)(3)'s notice requirements.

Moreover, the court of appeals also correctly held that petitioner "did not suffer any prejudice, as he promptly submitted his written response as soon as he returned to Japan" and "the Navy neither took action against him nor made any decision to do so" before he responded. Pet. App. 11a. Any procedural error in delivering the notice was therefore harmless. See *Wagner* v. *United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004). Indeed, petitioner concedes (Pet. 26 n.19) that any delay in providing notice could be deemed harmless, if DOPMA does not provide for automatic appointment—which, as discussed below, it does not.

In all events, the Federal Circuit's unanimous and factbound conclusion that the written notice provided to petitioner satisfied Section 624(d)(3) presents no question of general applicability and does not warrant this Court's review.

2. Petitioner contends (Pet. 19-21) that DOPMA's plain language provides for automatic appointment when

an officer is not provided timely notice pursuant to Section 624(d)(3), regardless of whether the President has actually appointed the officer to the new position and regardless of whether the officer is even qualified for the new position. He further contends (Pet. 21-24) that precedent in the Federal Circuit, including the decision below, incorrectly holds that his interpretation of DOPMA would render the statute unconstitutional.

a. As an initial matter, because the court of appeals concluded that petitioner received timely notice of the delay in his promotion, it expressly declined to reach the question whether petitioner would have been automatically appointed by operation of law in the absence of timely notice. Pet. App. 12a. This case is therefore not a suitable vehicle to resolve the second question presented. The factbound question of the timeliness of petitioner's notice is necessarily antecedent to the constitutional and statutory arguments raised by the second question, and resolution of the timeliness question against petitioner would obviate any need for the Court to address those broader questions. Moreover, because the court of appeals did not pass on the issues raised by the second question, if the Court were to grant review, it would be doing so without the benefit of a thorough discussion by the court of appeals in the context of petitioner's case.

b. In any event, as the government has explained in its brief in opposition to the petition filed by the same counsel in *Lewis* v. *United States*, petition for cert. pending, No. 06-1289, petitioner is wrong on the merits of both of his arguments.

First, regarding the statutory language, petitioner relies principally upon Section 624(a)(2), which states: "Except as provided in subsection (d), officers on a pro-

motion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. 624(a)(2). Petitioner contends (Pet. 19-21) that this provision mandates that an officer whose name is on a promotion list approved by the President and confirmed by the Senate must be—and, therefore, automatically is—promoted if the officer is not provided timely notice pursuant to Section 624(d), even if, as in petitioner's case, the officer is unqualified for the promotion.

Petitioner's interpretation is incorrect, because it reads Section 624(c) out of the statute. Section 624(c) requires that "[a]ppointments under this section shall be made by the President." 10 U.S.C. 624(c). This language unambiguously and without exception requires Presidential appointment of all officers promoted under the statute—an appointment that is separate and distinct from Section 624(a)(1)'s requirement that the President approve the selection board's report before preparation of the promotion list. Cf. *Weiss* v. *United States*, 510 U.S. 163, 170 n.5 (1994) ("10 U.S.C. § 624 requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade—*e.g.*, if a captain is promoted to major, he must receive another appointment.").

As the *Dysart* court explained, "the language of the statute does not provide for automatic appointment without action by the President. Rather, the statute provides that appointments are made 'by the President, by and with the advice and consent of the Senate.'" 369 F.3d at 1313 (quoting 10 U.S.C. 624(c)). DOPMA, in short, does not permit appointments without Presidential action. Petitioner's claim to the contrary flatly contradicts the plain language of the statute.

This understanding of DOPMA is confirmed by the fact that Section 624(d)(3) does not specify that automatic appointment is the consequence of a failure to provide timely notice. Indeed, if Congress had provided for automatic appointment in Section 624(d)(3), that would have directly contradicted the Presidential appointment requirement in Section 624(c). As this Court has explained on numerous occasions, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). Cf. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the [statutory] deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."). Because Congress did not provide for automatic appointment in DOPMA, the court of appeals correctly declined to recognize such an appointment.

Petitioner's assertion (Pet. 20-21) that the 1981 amendment to Section 624(d)(3), which added the impracticability provision, demonstrates that Congress understands DOPMA to provide for automatic appointment is unavailing. That technical correction to DOPMA does not suggest that DOPMA provides for automatic appointment in the absence of timely notice, but instead clarifies two ambiguities that existed in the original provision. First, it clarifies that, except in cases of impracticability, written notice must be provided to the officer *before* the officer's projected promotion date. The original provision did not specify *when* notice had to be provided. See Pet. 20 ("When DOPMA was passed in 1980,

it provided only that '[t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the [grounds for the] delay.'") (quoting DOPMA, Pub. L. No. 96-513, § 105, 94 Stat. 2858). Requiring written notice before an officer's projected promotion date, except in cases of impracticability, is consistent with Congress's objective of creating a fair and efficient promotion system. Second, it clarifies that when, as here, providing written notice before the projected promotion date is impracticable, the military can still comply with the statute if it provides written notice to the officer as soon as practicable.

The legislative history cited by petitioner (Pet. 20-21) confirms this understanding of the amendment. Indeed, the impracticability provision, which expressly sanctions the provision of a notice of delay *after* the projected promotion date, would make little sense if Congress believed that automatic appointment occurs on the projected promotion date.

Moreover, as discussed below, such an automatic-appointment provision would, at a minimum, create significant constitutional concerns. Congress's silence regarding the consequence of a failure to provide timely notice therefore should not be read as implicitly providing for automatic appointment. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Accordingly, petitioner's claims are without merit.

Second, petitioner's contention (Pet. 21-24) that his interpretation of DOPMA would not raise significant constitutional problems is equally without merit. As the *Dysart* court correctly explained, the "constitutional process allows the President complete discretion in choosing whether or not to appoint an officer." 369 F.3d

at 1311. Chief Justice Marshall said as much in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), in which he explained that the appointment is "the sole act of the President." *Id.* at 157. Thus, even if it intended to provide for automatic appointments in DOPMA, "Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic appointments." *Dysart*, 369 F.3d at 1314.[5] Although the Federal Circuit did not address the issue in this case, the Federal Circuit has appropriately recognized this obvious constitutional problem arising from petitioner's interpretation of DOPMA and declined to adopt that interpretation.

In any event, there is no warrant for review by this Court of a constitutional question that is easily—and properly—avoided by a correct interpretation of DOPMA. Cf. *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) ("Under our precedents, '[b]efore inquiring into the applicability of [a provision of the Constitution], we must "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."'") (quoting *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998)).

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[5] Petitioner's alternative argument (Pet. 23 n.13) that Congress can provide for automatic appointment through the use of its constitutional authority over the appointment of inferior officers is similarly without merit. To the extent the Constitution permits Congress to alter the process for the appointment of inferior officers, the Constitution gives Congress only the power to "vest the Appointment of such inferior Officers * * * in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The Constitution does not give Congress the power to provide for automatic appointment. Under petitioner's reading, however, that is precisely what Congress has done in DOPMA.

3. Review is also unwarranted because the question presented concerning the operation of Section 624 has limited prospective importance. Although thousands of military promotions are made annually under DOPMA, petitioner cites only three reported cases (excluding this case) in which this question has arisen under DOPMA. *Ibid.*[6] The existence of four reported cases in the roughly twenty-six years since DOPMA took effect in 1981 hardly makes this question a "recurring" (Pet. 3, 16) one. To the contrary, history shows that DOPMA has helped ensure that military promotion decisions are made timely, fairly, and efficiently, without significant involvement by the courts. This Court's review of a question that has arisen—and is likely to arise—only sparingly is not warranted.

4. Finally, even apart from its limited practical importance, this case would be an inappropriate vehicle to address either of the questions presented. As discussed, petitioner does not challenge the court of appeals' ruling that, in light of his personal misconduct, the Navy had an appropriate basis for delaying—and ultimately denying—his promotion. Whatever else is true, there is no reason to reach out and decide the constitutional and statutory questions framed by petitioner when he is manifestly unqualified for the position at issue.

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[6] As noted, a petition for a writ of certiorari is pending before this Court in one of those three cases, *Lewis* v. *United States*, No. 06-1289. The government has filed a brief in opposition to that petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DANNY T. BARNES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government insists that the Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, requires the President, following Senate confirmation, to issue letters of appointment or take some other unspecified step in order to effectuate the appointment of promoted military officers. But nothing in DOPMA requires or even contemplates such presidential action. The single provision the Government invokes does not remotely support its position. And even if it did, other provisions the Government ignores conclusively disprove the Government's contention. Section 624(a)(2) could not be clearer: Officers who have been nominated by the President and confirmed by the Senate for promotion "shall be" appointed *unless* they are given statutorily sufficient notice that their promotions are delayed and are then removed from the promotion list within the statutorily-prescribed time period. There is no plausible textual basis, therefore, for avoiding consideration of whether DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

That pure question of law warrants review. The Government agrees that the Federal Circuit is the only court that will face the issue and that it has conclusively resolved the question. When considered with *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), the decision below therefore effectively creates a nationwide rule. Absent review, it will subject countless military officers to unwarranted denials or delays of promotion. This result is precisely what Congress sought to avoid by enacting DOPMA, which was designed to bring certainty and efficiency to a process that affects thousands of military officers every year. The fact that no other circuit will interpret DOPMA's delay provisions or consider the important statutory and constitutional issues raised here demonstrates the necessity of this Court's review.

A petition raising the same Question Presented here is already pending before the Court. *See Lewis v. United States*, No. 06-1289. Petitioner respectfully requests that this Court grant both his petition and *Lewis*, and consolidate the cases for argument.

A. The Question Presented Is Important and Recurring.

The Federal Circuit has correctly acknowledged that the interpretation of DOPMA's delay provisions raises "*significant questions* concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306 (emphasis added). Nevertheless, the Government contends that the Court should deny review because the question is not recurring and therefore is of limited prospective importance. This argument is without merit.

1. Although the Government acknowledges that "thousands of military promotions are made annually under DOPMA," Opp. at 17, it claims that the Question Presented is not recurring because only a handful of reported cases—including *Lewis*—have addressed DOPMA's delay provision, 10 U.S.C. § 624(d). But reported cases are not even close to the best indicator of the frequency with which the Question Presented arises. The vast majority of military personnel issues are adjudicated by record correction boards created by 10 U.S.C. § 1552, and never reach the courts because the affected service-member lacks the financial resources needed for litigation. As a practical matter, it is impossible for anyone outside the Government to know precisely how many section 624(d) cases have come before—or are currently pending in—the correction boards. But the bipartisan congressional correspondence reproduced as an appendix to this reply shows that violations of section 624(d) are by no means a rarity. Reply App. 1ra-3ra. Considering the sheer number of officers who undergo the promotion process each year, that correspondence suggests that the re-

ported cases to which the Government has restricted itself in seeking to minimize the scope of the problem are only the tip of the iceberg.

2. The Government does not dispute that the Federal Circuit has addressed the issue and that no other court of appeals will have the opportunity to interpret DOPMA's delay provisions because claims like Mr. Barnes's are litigated exclusively in the Federal Circuit. The Federal Circuit's flawed interpretation thus creates a *de facto* nationwide rule regarding DOPMA's meaning. This Court routinely grants review in patent cases from the Federal Circuit, where "conflict among and with other federal courts . . . has been virtually eliminated," based "largely on the importance of the questions presented." Robert L. Stern et al., *Supreme Court Practice* 263 (8th ed. 2002). The same result is warranted in this case. Absent review and correction here, the decision below will continue to subject the officer corps of all of the military services—including the thousands of officers who are promoted each year—to uncertainty that Congress not only never intended but in fact affirmatively sought to prevent.[1]

The Government also glosses over the Federal Circuit's essential constitutional holding in *Dysart* (reaffirmed in *Lewis* and the decision below) concerning *Marbury* and the Appointments Clause. Like the Court of Appeals, the Government does not grapple with whether Congress may vary

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[1] The legislative history of recent amendments to DOPMA confirms that uncertainty in the promotion process is unacceptable. *See* S. Rep. No. 109-254, at 316 (2006) ("Relegation of any officer to a . . . 'limbo' status serves the interest of neither the individual officer nor the officer corps."); *see also Lewis* Reply at 3 n.2 (explaining that these amendments do not change the analysis here).

in any way the manner in which the required steps in the appointments process take place.[2]

B. The Government's Interpretation of DOPMA Wrongly Subjects Thousands of Military Officers to Unwarranted Promotion Denials and Delays.

The Government's reading of DOPMA suffers from the same flaws as the Federal Circuit's interpretation. DOPMA plainly provides that an officer nominated for promotion by the President, 10 U.S.C. §§ 618(c)(1), 629(b), considered and confirmed for that office by the Senate, *id.* § 629(b), and assigned a projected promotion date by a service secretary, *id.* §§ 624(b), 741(d), is appointed on his projected promotion date absent statutorily sufficient notice that his appointment will be delayed. *Id.* § 624(d)(3). Such notice must be given prior to the officer's projected promotion date and, absent notice, the officer will be promoted on that date unless giving prior notice is impracticable. *Id.*

Despite this clear statutory scheme—which sets forth the role of both the Executive and Legislative branches in the appointments process and delineates clear mechanisms and

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[2] Instead, the Government falls back on the avoidance canon, suggesting that review is unwarranted because the lower court's interpretation of DOPMA avoids any constitutional issues. Opp. at 16. That canon, however, is not applicable where, as here, the Court would have to ignore clear statutory language and congressional intent, adopt an implausible reading of a statute, or write language out of a statute. *See, e.g.*, *HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (error to apply canon where meaning of statute is clear); *Miller v. French*, 530 U.S. 327, 337 (2000) (rejecting construction that would avoid difficult separation of powers questions when that construction was implausible and would have subverted plain meaning of statute); *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (rejecting argument that deadline should be read out of statute to avoid due process issue because "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted") (internal quotation marks omitted). The Government asks the Court to do all three.

timeframes for Executive action—the Government argues that the President has unlimited discretion to delay military appointments. *E.g.*, Opp. at 15. It relies almost exclusively on section 624(c), which provides that:

> Appointments made under this section shall be made by the President, by and with the advice and consent of the Senate, *except that* appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(Emphasis added.)

According to the Government, section 624(c) requires some presidential action beyond section 624(a)'s requirement that the President approve the list of officers recommended for nomination by the selection board. Opp. at 13. But section 624(c) requires nothing of the kind. On the contrary, because most military officers are "inferior officers" within the meaning of the Appointments Clause, *see Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring), for whom Congress has the power to vary the appointments process, section 624(c) simply clarifies that certain lower-grade officers are exempt from the advice and consent requirement. *See* U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). This exemption from Senate confirmation does not remotely support the Government's view about what kind of presidential action is required to effectuate an appointment, but it is the only provision the Government cites to support its position.

Moreover, even if section 624(c) otherwise supported the Government's view, other provisions of the statute noted below undercut that view. Under the Government's view, the default rule for confirmed officers would be that they would not be appointed absent some additional Executive act following Senate confirmation. But the delay provisions would make no sense if that were the statute's meaning. For example, the provision requiring notice of a delay prior to an officer's projected promotion date would be completely unnecessary if an officer would not expect to be appointed on that date unless otherwise notified in advance.[3] The default contemplated by the statutory scheme is plainly that an officer will be appointed on his or her projected promotion date.[4]

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[3] The Government turns the notice provision on its head, stating that it "expressly sanctions the provision of a notice delay *after* the projected promotion date," which "would make little sense if Congress believed that automatic appointment occurs on the projected promotion date." Opp. at 15 (emphasis in original). Precisely the opposite is true. DOPMA was amended in 1981 to add an impracticability *exception* to the prior language, which simply provided that an appointment could "not be delayed unless the officer ha[d] been given written notice of the delay." 94 Stat. 2858. The legislative history confirms that the impracticability language was added to respond to the possibility that, under the original version, an officer might have been promoted simply because notice of a delay had not been transmitted to him or her in a timely fashion. *See* H.R. Rep. No. 97-141 at 14 (1981) ("This amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or while absent without leave) to receive written notice that the promotion is being delayed."). The Government's attempt to turn the impracticability exception into some sort of general rule allowing notice after a projected promotion date is nonsensical. There would have been no need for Congress to add this exception if an officer would not otherwise be promoted on his or her projected promotion date.

[4] The Government further argues that a "coercive sanction" cannot be imposed by the courts if a statute does not specify a consequence for non-compliance with timing provisions. Opp. at 14. This is unpersua-

At a minimum, the Government reads the following provisions entirely out of DOPMA: (1) section 624(a)(2) ("officers on a promotion list . . . shall be promoted" except as provided in the delay provisions); (2) section 624(d)(1) ("the appointment of an officer under this section may be delayed" due to pending disciplinary or other proceedings); (3) section 624(d)(2) (providing additional grounds for delay and setting forth procedures for the promotion of delayed officers who are ultimately retained on the promotion list); (4) section 624(d)(3) ("[t]he appointment of an officer may not be delayed" without written notice "unless it is impracticable to give such written notice before the effective date of the appointment"); and (5) section 624(d)(4) (prescribing time limits for promotion delays).

Because the Government's solitary focus on section 624(c) ignores the fact that DOPMA's other provisions clearly provide that an officer is "appointed" following Senate confirmation *unless* the officer is properly notified of a delay and the President then takes affirmative action to remove the officer's name from the promotion list within the statutorily-prescribed period, the Government violates the principle that statutory construction "is a holistic endeavor." *See, e.g., United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

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sive. Appointment of an officer nominated by the President and confirmed by the Senate is in no sense a "sanction." Promotion under DOPMA occurs by operation of the statute, and a court upholding such a promotion is merely recognizing the result Congress guaranteed in passing this legislation. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003), and *Regions Hospital v. Shalala*, 522 U.S. 448, 459 n.3 (1998), on which the Government relies, are inapposite because the courts in those cases were imposing the restrictions on agency behavior themselves, rather than applying a law that specified the appropriate result.

The constitutional concerns driving the Government's reading of DOPMA are equally misplaced. When it enacted DOPMA, Congress neither enlarged its own appointment power nor impermissibly infringed on the Executive's appointment power. Similarly, DOPMA does not violate *Marbury*, as that case does not mandate that the requisite steps in the appointments process take place in any particular order. Rather, *Marbury* makes clear that appointment occurs "when it is shewn that [the President] has done every thing to be performed by him." 5 U.S. at 157. As explained in the petition, when the President nominates an officer for promotion, he does so with the understanding that the officer will be appointed after Senate confirmation absent some Executive action to delay the appointment and remove the officer's name from the promotion list during the statutorily-defined period. Pet. at 24. Thus, the showing that *Marbury* requires—that the President has done all that is required of him—is made when the President nominates an officer and then chooses not to take subsequent action that complies with statutory procedures to delay or prevent the promotion.[5] *See also id.* The Government does not explain why *Marbury* creates an inflexible rule governing all appointments over *two centuries* later and thus barring an efficient, modern military appointments process, and that question merits review.

C. The Court Can Reach the Statutory and Constitutional Issue in this Case.

Contrary to the Government's assertions, the Federal Circuit's holding that it was impracticable to provide Mr. Barnes with timely notice of his promotion delay simply be-

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[5] The Government's insistence that a letter of appointment or some comparable document must be delivered to an officer to effectuate his or her promotion is unfounded. The Government points to no provision in DOPMA that requires such an additional Executive act, and it therefore cannot be the "last act" necessary to effectuate an appointment unless *Marbury* requires it. The important question of what *Marbury* requires is thus squarely raised here.

cause he was at sea does not pose a fact-intensive question barring this Court's review. Notice of Mr. Barnes's promotion delay was sent to his base even though he was at sea; he was reachable aboard the USS *John S. McCain* by a variety of means, including e-mail, fax, telephone, and electronic message, and received e-mails while on the ship both before and after his projected promotion date; *over a week after* his projected promotion date, an officer at his base informed the Bureau of Naval Personnel that he did not want to mail the delay documents to Mr. Barnes while he was at sea;[6] *two weeks after* his projected promotion date, Mr. Barnes received an e-mail aboard the *McCain* informing him of his promotion delay; and *three weeks after* his projected promotion date, he was given the memorandum regarding his promotion delay. Pet. at 10-12; Opp. at 5. None of these facts is disputed.

In this day and age, it is meritless to argue that the Navy could not have ascertained that Mr. Barnes was at sea and sent the notice to his ship rather than to his base. He was reachable while aboard the *McCain*, and it defies explanation why the e-mail informing him of his promotion delay was not sent to him until *two weeks after* his projected promotion date rather than before that date.[7] Because the underlying

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[6] The Government suggests that deference should be given to this "determination." Opp. at 10-11. But the officer did not make any determination regarding giving Mr. Barnes notice until after his projected promotion date had passed. Pet. at 11. Moreover, DOPMA requires an inquiry into whether notice was practicable, not into whether an officer subjectively considered notice to be practicable. As this Court has noted, determinations as to whether something is practicable, rather than as to whether something is considered practicable, are entitled to reduced, if any, deference. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2792 & n.51 (2006); *see also id.* at 2801 (Kennedy, J., concurring); Pet. at 26 n.18.

[7] The Government contends that Mr. Barnes has equated impracticability with impossibility. Opp. at 10. But Mr. Barnes does not dispute the Government's definition, namely that something is impracticable if it is "incapable of being performed or accomplished by the means em-

facts are not disputed, the Federal Circuit's impracticability determination is a legal conclusion subject to *de novo* review. *E.g.*, *Imperial Cas. & Indem. Co. v. Chicago Housing Auth.*, 987 F.2d 459, 461 (7th Cir. 1993); *see also SMS Data Prods. Group, Inc. v. United States*, 853 F.2d 1547, 1553-54 (Fed. Cir. 1988). This Court can easily address this question, and the Federal Circuit's cursory holding on the issue should not insulate that court's incorrect decision from review.[8]

Finally, the Government argues that the Court should not grant the petition because Mr. Barnes is not qualified for promotion. Opp. at 17. But even the Government does not contend that Mr. Barnes's substantive qualifications are relevant to the Question Presented. The issue is what DOPMA means and whether the Government violated it here. That question warrants review.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

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ployed *or at command*: infeasible." *Webster's Third New Int'l Dictionary* 1136 (1961) (emphasis added) (cited in Opp. at 10). Here, the Executive clearly had tools at its command to inform Mr. Barnes of the delay in a timely fashion; notice was not infeasible.

[8] The Federal Circuit's alternative holding that any defect in the notice Mr. Barnes received was harmless assumes the correctness of the Federal Circuit's interpretation of DOPMA. If DOPMA has the meaning Mr. Barnes attributes to it, the error cannot be harmless because Mr. Barnes would have been promoted on his projected promotion date.

Respectfully submitted,

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August 14, 2007

REPLY APPENDIX

COMMITTEE ON ARMED SERVICES
U.S. House of Representatives
Washington, DC 20515-6035
ONE HUNDRED EIGHTH CONGRESS

February 25, 2004

Honorable David S. C. Chu
Under Secretary of Defense
Personnel and Readiness
Pentagon 3E764
Washington, DC 20301-4000

Dear Secretary Chu:

We have become aware of a significant problem in the way that the Department of the Navy, as well as the Office of the Secretary of Defense, is handling the review of the cases of officers whose promotions have been delayed in accordance with sections 624(d) and 14311(d) of title 10, United States Code. These sections permit the delay in the promotion of officers to resolve matters that may have arisen or been discovered following the officer's selection by a promotion board. However, the statutes set a maximum delay in the promotion of such officers at 18 months from the date that the officer would have normally been promoted.

Subcommittee staff discussions with the Navy have identified a total of 33 Navy cases in which promotions have been delayed for significant periods beyond the 18-month statutory limit. For example, the promotion of one Naval

Reserve officer has been delayed since November 1, 1998 — a delay of 64 months, which is more than four years beyond the limit allowed by law. In another case, an active duty Navy officer's promotion has been delayed since May 23, 1999 — a delay of 57 months, which is more than three years beyond the limit in statute. All the other cases the subcommittee staff reviewed involve promotions that have been delayed since 2000 through 2002.

We understand that the Navy has begun a process to expeditiously resolve the cases of delayed promotions involving active duty Navy officers and to institute a system to prevent inordinate delays in the future. However, the cases involving the delayed promotions of Naval Reserve officers require that your office turn its attention to more quickly obtaining decisions on those cases which, under current procedures, may ultimately require a decision by the President.

The attached list of delayed promotions for Naval Reserve officers illustrates that inordinate delays are experienced at all levels of the chain — from the Department of the Navy through the Office of the Secretary of Defense — through which these actions must tortuously pass.

The negative impact on the officers concerned of these largely administrative delays is unwarranted. We understand that most of the officers are eventually promoted and the system does provide for the payment of lost pay. However, extended delays in promotion result in the officers losing competitiveness with their contemporaries, which ultimately means lost or degraded opportunity for future promotion.

We request that you expeditiously resolve the Naval Reserve cases on this list. Furthermore, because we believe that the problems being experienced by the Navy may also be evident in the other military departments, we ask you

undertake a review of the process and identify reforms necessary to ensure that the processing of delayed promotions for active and reserve officers in all the military departments does not exceed the statutory limit of 18 months.

We look forward to hearing from you on the results of your review and about your prescription for corrective action. As always, if there are specific actions that the subcommittee might take to assist you, we would be happy to entertain your recommendations.

Sincerely,

s/_____
John M. McHugh
Chairman
Subcommittee on Total Force

s/_____
Vic Snyder
Ranking Member
Subcommittee on Total Force

JM/VS:jdc
Enclosures